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In the Supreme Court of the United States

RICARDO RIOS, II; MARISELA RIOS, Individually and as next friend of their minor children, RICARDO RIOS III, LAURA YVETTE RIOS, and IVAN ALEJANDRO RIOS,

Petitioners,

v.

THE CITY OF DEL RIO, TEXAS; WESLEY WILSON; and MANUEL HERRERA; et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit, improperly reversed the trial court's denial of defendants' 12(b)(6) Motion to Dismiss grounded on qualified immunity, and incorrectly refused to recognize the state created danger doctrine in conflict with all other circuits, and improperly refused to apply the doctrine under standards about which the circuits are in disagreement.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners, individuals, state that they have no parent companies or nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is case number 04-50774, and is unreported.

JURISDICTION

The Court of Appeals judgment was rendered on March 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Substantive Due Process Clause of the Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV §1.

The relevant portion of 42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, shall be liable to the party injured in an action at law." 42 U.S.C. §1983.

Amendment VII to the Constitution provides the right to a jury trial: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII.

STATEMENT

Statement of Facts

The facts of this case are tragic yet simple and undisputed. On June 30, 2002, Petitioner and Plaintiff Ricardo Rios II (Mr. Rios), was a U.S. Customs Enforcement Officer at the Del Rio port of entry at the border of the United States with Ciudad Acuna, Coahuila, Mexico. Officer Rios sustained extreme, permanent, and life altering injuries when he was struck by a Del Rio Police Department patrol car which had been left unattended, with the engine running, and it was commandeered and driven by an escaping prisoner, Reymundo Avalos ("Avalos"). R. 5.

Earlier that evening, Appellee Wesley Wilson (Officer Wilson), an officer of the Del Rio City Police Department, arrested and placed Avalos in the back-seat of his patrol car. Avalos was an adult who had a known criminal record with prior experience escaping from police custody. His history of escaping from custody was so well known by the officers of the Del Rio Police Department including the police chief, Appellee Herrera, that the officers referred to Avalos by the nickname "Houdini." R. 5.

Officer Wilson, in violation of state law under the Texas Transportation Code §545.404, left the keys in the ignition of the running vehicle with Avalos unattended in

the back-seat while he went to visit with an acquaintance he saw who lived nearby. R. 5. While Officer Wilson was out of the car during the arrest visiting with that person, Avalos escaped from the rear seat of the patrol car into the front seat, gained control of the vehicle, and sped away. R. 5.

The police department issued an "all points alert" on the escaping prisoner, and proceeded to channel him towards the port of entry. The police radioed Customs Officers at the point of entry, including Mr. Rios, and asked for assistance in arresting Avalos. R. 5-6.

At no time did the police inform the Customs Officials that the vehicle being driven by Avalos was an official marked patrol vehicle. R. 6. While chasing the stolen police car, Del Rio Police officers had opportunities to block or disable the vehicle, but made a conscious decision not to do so. R. 6. As Avalos sped in the stolen car through a lane of the port of entry, the vehicle violently struck Mr. Rios causing him extreme, life-threatening injuries including the amputation of his right leg below the knee, the removal of his right eye, numerous body and facial bone fractures, permanent loss of hearing in his right ear, a sever concussion, and permanent severe mental impairment. Mr. Rios is permanently disabled, homebound with mental, emotional, and physical impairment caused by the Del Rio Police Department's conduct.

Statement of the Case

On November 19, 2003, Petitioners sued the City of Del Rio and Appellants Wilson and Herrera for violation of 42 U.S.C. §1983 and section 101.021 of the Texas Civil Practice and Remedies Code. R. 1-10. After filing their answer, Appellees and the City of Del Rio filed Defendants'

Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), for "failure to state a claim upon which relief can be granted," on the ground of qualified immunity. R. 17-33.

Based on the deposition testimony of Lt. John Lissner, a lieutenant with the Del Rio Police Department who was the highest ranking officer on duty at the time of the incident, Respondents and the City filed their Supplemental Motion to Dismiss on March 8, 2004. R. 55-209. Petitioners filed their response to the supplemental motion on March 15, 2004. R. 210-214.

This case was referred to Magistrate Judge Dennis G. Green who, on July 14, 2004, signed an order denying the motion to dismiss filed by Appellees and the City "with regard to Plaintiff's claim under Section 1983 for a Fourth Amendment violation." R. 255-264. On August 3, 2004, Judge Green signed a nunc pro tunc order noting that the motion to dismiss was granted as to Plaintiff's Fourth Amendment search and seizure claim against the City of Del Rio but was denied in all other respects. R. 280. The Fifth Circuit decision overruling the District Court's denial of the defendant's motion to dismiss was entered on March 27, 2006.

Appellees appealed to the Fifth Circuit on the ground of qualified immunity. The Fifth Circuit reversed the portion of the district court's order denying the Respondents' motion to dismiss and remanded the case to the district court for further proceedings consistent with the opinion. The Fifth Circuit, in conflict with holdings in other circuits, refused to recognize the state created danger doctrine. The Fifth Circuit nonetheless purported to analyze the state created danger claim, but that analysis again conflicts with opinions in other circuits and with another Fifth Circuit opinion. The Fifth Circuit has not,

and obviously will never, clearly accept or reject the state created danger doctrine. That hesitancy makes this case a compelling candidate for Supreme Court review.

REASONS FOR GRANTING THE PETITION

1. The State Created Danger Doctrine

The basic criteria for a §1983 claim is that a person, acting under the color of state law, committed an act that deprived another of rights secured by the Constitution. *Parrat v. Taylor*, 451 U.S. 527, 535 (1981). The state created danger doctrine is an exception to the rule of qualified immunity of state officials from suit granted under §1983. Qualified immunity is based upon the idea that "government officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would [or should] have known." Mark R. Laramie, *Recent Development: State Created Danger, Qualified Immunity, and "Clearly Established Law": A Note on* McClendon v. City of Columbia, 78 Tul. L. Rev. 1011, 1014-1015 (2004), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The state created danger doctrine arises when a private party deprives a third party of his constitutional rights as a result of dangerous circumstances created by a state actor. Jeremy Daniel Kernodle, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. §1983 and the State Created Danger Theory*, 54 Vand. L. Rev. 165, 169 (2001).

For a plaintiff to successfully state a §1983 claim, the Supreme Court requires two elements to be proven – that an actor acting under the color of state law committed the action in question and that the action deprived a person of any rights secured by the Constitution or laws of the United States. Kernodle, 54 Vand. L. Rev. at 168. What constitutes "deprivation" is a focus of any state created danger claim. *Id.* at 169.

If a state official acted in a way that created or increased a danger which led to a person's injury, and subsequently failed to protect that person, the government can be held liable under §1983. *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982); Kernodle, 54 Vand. L. Rev. at 172.

The concept of governmental liability for the acts of a third party due to a danger which the government created was most notably recognized in *Deshaney v. Washington County Dep't of Soc. Services*, 489 U.S. 189 (1989), in which a divided Court ruled that the state had no duty to rescue a young boy from his father's abuse. *Deshaney* outlined that liability for the state could attach under certain circumstances. Laura Oren, *Safari Into the Snake Pit: The State Created Danger Doctrine*, 13 Wm. & Mary Bill Rights J. 1139, 1140 (2005).

There are three basic questions that the court must ask in a state created danger case. First, has the victim suffered an invasion of a liberty interest, second, did the state create or cause the danger that inflicted the loss, and third, did the state official who created the danger act with the requisite degree of culpability. Oren, 13 Wm. & Mary Bill Rights J. at 1148 and see *Wood v. Ostrander,* 879 F.2d 583, 587 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). Mr. Rios can answer all three questions affirmatively.

The state created danger doctrine is also articulated in another, more specific series of questions: "1) Did state officials exercise authority or power; 2) in such a way that they put someone in a *worse* position than they would otherwise have occupied; 3) risking and causing a significant harm; 4) with a degree of culpability (which might be deliberate indifference) amounting to conscience-shocking behavior in the factual context?" Oren, 13 Wm. & Mary Bill Rights J. at 1189. Mr. Rios's claim fulfills all of these criteria as-well. But, if the Fifth Circuit's ruling is left as the last word in this case, Mr. Rios, a citizen and officer in the United States Customs Service, injured by government misconduct, will never have a chance for his case to be heard.

2. Necessity of Review

Supreme Court review of the Fifth Circuit decision in *Rios v. City of Del Rio, et al., Wesley Wilson, Manuel Herrera*, No. 04-50774 (5th Cir. 2006) is necessary because Mr. Rios's claim is meritorious; satisfies all 12(b)(6) requirements; and, in the name of justice, should be tried on the merits. More importantly this Court needs to resolve the dispute among the circuits over how the state created danger theory should be recognized, and the Court needs to clarify inconsistencies that have arisen regarding state created danger law among the circuits. And, the Fifth Circuit must be brought into compliance with the other circuits and the U.S. Supreme Court.

Versions may vary slightly, but every United States Circuit Court in America accepts the state created danger doctrine, with the exception of the Fifth. Case Note, *Constitutional Law – Substantive Due Process – Fifth*

Circuit Rejects §1983 "State Created Danger" Claim of Plaintiff Shot by Undercover Informant Using a Gun on Loan From City Police Officer – McClendon v. City of Columbia, 116 Harv. L. Rev. 1912, 1912 (2003); See also:

1) *Frances-Colon v. Ramirez*, 107 F.3d 62 (1st Cir. 1997) [accepting the doctrine in "rare and exceptional circumstances"];

2) *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993) [recognized state created danger claim when the government violates an individual's rights];

3) *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) [set out the four elements of a third circuit state created danger claim: first, the harm ultimately caused was foreseeable and fairly direct, second, the state actor acted in willful disregard for the safety of the plaintiff, third, there existed some relationship between the state and the plaintiff, and fourth, the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur];

4) *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995);

5) The conflict over the state created danger doctrine in the Fifth Circuit is the basis for, and makes up the necessity of, this appeal;

6) *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998);

7) *Reed v. Gardner*, 986 F.2d 94 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993) [explanation to follow on page 11];

8) *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990);

9) *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied,* 498 U.S. 938 (1990) [state created danger doctrine requires that the defendant put the plaintiff in a position of danger, which is a common element of state created danger claims which has been interpreted differently throughout the circuits];

10) *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996) [the court accepted the existence of the state created danger doctrine but simply ruled that the doctrine did not apply in that particular case];

11) *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 494 U.S. 1066 (1990) *and overruled on other grounds* [emphasized that the state must place the plaintiff in a position of danger greater than and distinct from that facing the public at large and must significantly increase both the risk of harm to the plaintiff and the opportunity for the third party to commit the harmful act]; *White v. Lemacks,* 183 F.3d 1253 (11th Cir. 1999);

12) *Buerta v. District of Columbia,* 235 F.3d 637, 648-49 (D.C. Cir. 2001).

All other U.S. circuit courts vary somewhat in the application of the doctrine, but they all recognize it. Legal scholars have noted that there is some disparity between the circuits regarding state created danger and argue for a uniform standard with which to judge these claims. Kernodle, 54 Vand. L. Rev. at 165-203; see Oren, 13 Wm. & Mary Bill Rights J. at 1139-1191.

The circuits are using different standards to decide state created danger cases. Circuit courts therefore may

reach different results in similar cases, and different and seemingly opposite results can be reached within the same circuit, especially within the Fifth. Compare *Scanlan v. Texas A&M*, 343 F.3d 533 (5th Cir. 2003) and *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2002) (Two Fifth Circuit cases ruling in opposite ways on state created danger claims). A ruling on Mr. Rios's claim could remedy this uniformity problem.

The Fifth is not the only circuit that has exhibited difficulties in setting its parameters for state created danger claims. The Eighth Circuit has had trouble establishing what it will accept as a valid state created danger claim. Oren, 13 Wm. & Mary Bill Rights J. at 1152. There are two Eighth Circuit split en banc decisions regarding the state created danger doctrine. *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000); *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992). In *S.S. v. McMullen,* the Eighth Circuit was split over the requisite level of affirmative action required for a valid claim. Oren, 13 Wm. & Mary Bill Rights J. at 1153, citing *S.S.*, 225 F.3d at 962. In *McMullen* the Missouri Division of Family Services returned a child to his father – a man who associated with a known pedophile who later assaulted the child. *Id.* The majority ruled that the danger posed to the child was no greater than if he had never been taken into state custody, and therefore the state created danger doctrine did not apply. *Id.* at 1154.

Gregory v. City of Rogers involved police officers who stopped a man, who happened to be a "designated driver," for running a red light. *Gregory*, 974 F.2d at 1007. The driver had a "minor" warrant for his arrest, so the officers escorted him to the police station to clear it up. While the driver was taking care of the warrant, one of the

inebriated passengers commandeered, drove, and wrecked the car; killing himself and injuring the passenger. *Id.* at 1008. A split court ruled that all responsibility for the accident rested on the driver because he could have prevented the accident by removing the keys from the ignition when he exited the car at the police station and he was in a position to know the state of inebriation of his passengers. *Gregory,* 974 F.2d at 1011-1012. The potential irregularity in the Eighth Circuit's ruling in *Gregory* is that the original driver of the car was sober, and until the state interfered, the danger posed by the car was at a minimum. State created danger, however, was held not to have been invoked. After officers detained the original driver and allowed the keys to be left in the car with the intoxicated passengers, the danger posed by the car and those in it greatly increased. The Eighth Circuit, however, ruled that the officers did not or should not have known that the passengers were intoxicated, and therefore the fault rested with the original driver who could have taken the keys out of the car before he entered the police station. *Id.* at 1010.

The Seventh Circuit upheld the application of the state created danger doctrine in *Reed v. Gardner* under a very similar factual scenario as was presented to the Eighth Circuit in *Gregory v. City of Rogers. Reed*, 986 F.2d at 1123. The claim in *Reed,* like that in *Gregory*, derived from an intoxicated driver commandeering a car after the original driver was taken into police custody. *Id.* The Seventh Circuit, however, reached a different result than the Eighth. *Id.* The Seventh Circuit distinguished *Reed* from *Gregory* by emphasizing that the driver in *Reed* collided with innocent bystanders – who could present a valid state created danger claim if the state action created

or substantially contributed to the creation of a danger, or rendered them more vulnerable to a danger – and there was nothing in the pleadings to suggest that the original driver of the car was anything but sober. *Id.* at 1126.

The holdings in *Reed* and *Gregory* are a perfect illustration of the circuits reaching different results in factually similar state created danger cases. The majority in *Reed* held that when the state intervention created the dangerous condition, liability could attach and that "while they did not create the danger by buying Rice [the drunk driver] drinks and providing him with a car, they did take action under the color of state law which rendered Reed and other motorists . . . vulnerable to a dangerous driver." *Id.* at 1126-1127.

The Fifth Circuit's ruling in *Rios* is at odds with the Seventh Circuit's ruling in *Reed*. In both cases, unsafe police practices created a danger to the public. There is little factual difference between the two cases, with the exception that the specific plaintiff in *Rios* was more foreseeable than in *Reed*. By shepherding Avalos toward the border and not warning the Customs Agents, whom the Del Rio Police had to know were present and vulnerable, that Avalos was in a marked patrol car, the Del Rio police officers made those Customs Agents a specific group of plaintiffs. In *Reed*, the possible plaintiffs could have been anyone in the path of the drunk driver, a much broader group. In that sense, the state actors were more culpable for the injury in *Rios* than they were in *Reed*. Yet the Fifth Circuit dismissed Mr. Rios's complaint.

This incongruity between the circuits can be seen by looking at the application of the "specific plaintiff" rule. Some circuits allow liability for danger created to the

public at large, while others allow liability only for danger directed at a specific plaintiff. Kernodle, 54 Vand. L. Rev. at 179 [the Seventh Circuit does not require a specific plaintiff, *Reed v. Gardner*, 986 F. 2d 1122, 1127 (7th Cir. 1993)].

There is also incongruity among the circuits regarding the level of official action required for the attachment of state liability for acts of a third party. Kernodle, 54 Vand. L. Rev. at 178. Most courts require some level of affirmative action by a state official for the creation of liability, but the requisite level of action varies between the circuits. By accepting this case the Court can clear up, and clean up, the exact requirements for state created danger liability and unify the law among the circuits.

The Vanderbilt Law Review suggests a narrow test that claims must pass in order for them to be considered valid state created danger claims. Mr. Rios's claim fulfills even that narrow test. See generally Kernodle, 54 Vand. L. Rev. The suggested test requires an affirmative act by the state official, which did more than return the plaintiff to a state of pre-existing danger. *Id.* at 180. In the case at hand, that affirmative action of arresting Mr. Avalos, leaving him unattended in a running police car, allowing him to commandeer the car, and failing to warn the Customs Agents at the port of entry should satisfy the requirement of an affirmative act. These affirmative acts were the direct and proximate cause of the injuries sustained by the plaintiff. Avalos was not driving a vehicle when he was arrested, and he was placed by the Del Rio police in the position of sole occupancy of the vehicle with no supervision, in violation of Texas law. Tex. Transp. Code §545.404.

The defendants' actions must do more than return the plaintiff to a position of pre-existing danger in a state created danger claim. *Reed,* 986 F.2d at 1125; see also Kernodle, 54 Vand. L. Rev. at 191, citing *Deshaney*, 489 U.S. 189. If the danger to the plaintiff already existed and was not exacerbated by the conduct of the state official, then state liability would not attach. In the case at bar, the danger to the plaintiff was exacerbated by the conduct of the state officials. The police should have warned the Customs Agents at the port of entry that the suspect was in a police car. Without such a warning, the Agents at the border had no reason to be concerned about the approach of a Del Rio police vehicle or to prepare for the suspect to be driving one. Because the Del Rio police did not warn the Customs Agents that Avalos was in a police car yet channeled him toward the border, they created a greater danger than previously existed for the Agents at the port of entry. The acts of state officials which allowed Avalos to commandeer the police cruiser and the subsequent failure to warn the Customs Agents of that fact were not too far removed from the resulting injury to give rise to liability, in fact they contributed directly to plaintiff's injuries.

The narrow test suggested requires that the danger be targeted at a specific plaintiff or group of plaintiffs as opposed to danger that threatened the public at large. Kernodle, 54 Vand. L. Rev. at 189. By not warning the Customs Agents at the point of entry that the rapidly approaching and escaping suspect was in a marked patrol car and by corralling and hurdling that stolen car towards the point of entry, the Del Rio police made the Customs Agents at that point of entry a specific target. It was foreseeable to the Del Rio Police Department that their

lack of conveying vital information about the suspect and the situation would make the Customs Agents a group specifically vulnerable to injury.

Another aspect of a state created danger claim that all courts require is a level of culpability of the state official. Kernodle, 54 Vand. L. Rev. at 185. There is, however, no single guideline regarding the level of culpability necessary for liability to attach. *Id.* at 186. Most courts require that the state official act with deliberate indifference. See *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). The Court has said that "deliberate indifference" is the general standard for culpability in §1983 claims because it insures that the government was "the moving force behind the constitutional violation." *City of Canton v. Harris*, 489 U.S. at 388.

Some other formulations of the state created danger doctrine call for a "shock the conscience" standard. Oren, 13 Wm. & Mary Bill Rights J. at 1152, citing *Lemacks*, 183 F.3d at 1258 (discussing the Eleventh Circuit standard). The strict test proposed by the Vanderbilt Law Review calls for the overall situation to "shock the conscience" of the court. Kernodle, 54 Vand. L. Rev. at 194. One factor common among the circuits and scholars, however, is the requirement of a culpable mental state higher than mere negligence. A Supreme Court ruling is necessary to unify what level of culpability above negligence is required for a valid claim.

In *Rios*, it is evident that the police acted with a higher level of culpability than mere negligence. Had the Del Rio police not left Avalos in the back of a running squad car in violation of Texas state law, had they informed the Agents at the port of entry that Avalos was approaching

in a squad car at a high rate of speed, or perhaps had they not intentionally shepherded him toward the port of entry their level of culpability might only have reached the level of negligence. See Tex. Transp. Code §545.404. But taking all of their acts of that night together, the culpability of the Del Rio Police Department far exceeded mere negligence.

Causation is another common element of all state created danger claims. See Kernodle, 54 Vand. L. Rev. at 182, 191, citing *Armijo v. Wagon Mound Pub. Sch. Dist.*, 159 F.3d 1253, 1262 (10th Cir. 1998). Although most courts agree on the necessity of causation, courts disagree as to what level is required. Many circuit courts require "but-for" causation. See *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3rd Cir. 1996). A requirement of "but for" causation is satisfied if the basis for the suit would not have occurred "but-for" the acts of the defendant. "But-for" causation is satisfied in the case at hand because if it were not for the actions of the defendants, the plaintiff would never have been injured.

The state created danger rule is supported not only by legal scholars and the case law in all but one (the Fifth) of the United States Circuits but also by the statutory language of 42 U.S.C. §1983. 42 U.S.C. §1983 reads: "every person who, under the color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects *or causes to be subjected*, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured" [emphasis not in original]. According to David Pruessner in his article, *The Forgotten Foundation of State-Created Danger Claims*, the phrase "or causes to be subjected" was intended to address what is now referred to as state created danger where the official did not actually deprive the

plaintiff of his constitutional right but instead caused the plaintiff to be subjected to deprivations at the hands of a third party. See David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 Rev. Litig. 357 (2001).

3. Internal Fifth Circuit Conflicts

The Fifth Circuit has been consistent only in issuing contradictory opinions. The Fifth Circuit has ruled inconsistently regarding its recognition of the state created danger doctrine and the requisite levels of state action and culpability necessary for successful application of that doctrine. The Fifth Circuit has discussed the concept of the state created danger doctrine, but has neither adopted nor rejected it. See *Constitutional Law – Substantive Due Process – Fifth Circuit Rejects §1983 "State Created Danger" Claim of Plaintiff Shot by an Undercover Informant Using a Gun on "Loan" From a City Police Officer* McClendon v. City of Columbia, 116 Harvard L. Rev. 1912 (2003). One can also look to the powerful and convincing dissenting opinion of the Honorable Robert Parker in *McClendon*, who wrote that the "majority's Achilles heel is its unwillingness to either adopt or reject the state created danger theory as the law of the Circuit." *McClendon*, 258 F.3d at 334. Judge Parker goes on, "Our [the Fifth Circuit's] methodological approach – assuming arguendo for the purposes of each case that the state created danger theory is a valid one but never explicitly rejecting or adopting it – cannot be defended and leaves this area of circuit law in a perpetual state of confusion." *Id.*

With an absence of Supreme Court guidance, inconsistent results will continue to persist in our nation's courts.

116 Harvard L. Rev. at 1916. The Harvard Law Review article calls for a less stringent requirement for the foundation of a state created danger claim requiring only that the state actor affirmatively create the danger to the plaintiff for liability to attach. *Id.*

There are two recent Fifth Circuit cases that addressed the state created danger doctrine and came to contradictory rulings. *Scanlan v. Texas A&M University,* 343 F.3d 533 (5th Cir. 2003); *McClendon*, 258 F.3d at 432. In *Scanlan,* Texas A&M students sued the state university under a §1983 claim of state created danger alleging that Texas A&M was liable for injuries that the students received in the bonfire collapse of 1999. *Scanlan*, 343 F.3d 533. The bonfire, which was held annually before the UT-A&M football game, was a longstanding tradition. The bonfire was used by the university to solicit donations from alumni as well as a recruiting tool to entice prospective students to enroll in Texas A&M. *Id.* at 538. Plaintiffs alleged that the construction of the bonfire was deliberately unsupervised. *Id.* Plaintiff's claim was dismissed by the District Court for the Southern District of Texas. *Id.* at 533. The Fifth Circuit reversed that dismissal and remanded the case, ruling that the plaintiff's factual allegations showed that the construction was dangerous and that the danger was known to university officials. *Id.* at 540. Texas A&M officials used their authority to create the possibility of the occurrence of the ultimate harm, and were held liable for the harm that did result. However, even *Scanlan* was not an outright acceptance of state created danger by the Fifth Circuit. *Avila v. Houston Independent School District*, No. 03-20098, at n. 5 (5th Cir. 2003) ruled that despite remanding the case for further proceedings, the court did not recognize the state created danger theory in

Scanlan. But, because the case was sent back to trial and not thrown out, the Fifth Circuit did not reject the state created danger doctrine.

When the holding in *Scanlan* is taken in conjunction with the holding in *McClendon v. City of Columbia*, the Fifth Circuit is seen clearly to be at odds with itself. See *McClendon*, 305 F.3d. In *McClendon,* plaintiff sued the City of Columbia on a state created danger claim deriving from the actions of a City detective. *Id.* at 319. The detective provided a gun to a drug informant who the detective knew to be in a disagreement with the plaintiff. *Id.* The informant then used the gun to shoot plaintiff in the face, permanently blinding him. *Id.* at 320. Plaintiff argued that defendants violated his due process rights under the Fourteenth Amendment by knowingly and affirmatively creating a dangerous situation that resulted in injury to him and by failing to take reasonable steps to diffuse that danger. *Id.* at 322. The Fifth Circuit rejected this claim. The majority opinion cited *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) which held that a state actor is entitled to qualified immunity if his or her conduct was objectively reasonable in light of legal rules clearly established at the time of his or her actions. *Id.* at 322, citing *Harlow*, 457 U.S.

The *McClendon* majority held that the state official must act with a level of culpability higher than mere negligence for liability to attach. *McClendon*, 305 F.3d at 323. Most circuits agree that a level of culpability higher than mere negligence is required for a successful state created danger claim. Some circuits have accepted the "shocks the conscience standard," meaning that the state act or acts that brought about the injury to the plaintiff must "shock the conscience" of the court. *Ulhrig*, 64 F.3d at

571; *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992). Most circuits agree that the plaintiff must either allege or prove that the defendant acted with "deliberate indifference." See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Under Fifth Circuit law, "to establish deliberate indifference" (as though that were possible) the plaintiff must show that the "environment created by the state actors [is] dangerous, further, they must know it is dangerous, and they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Piotrowski v. City of Houston*, 237 F.3d 567, 585 (5th Cir. 2001). The majority in *McClendon* held that what the detective did was mere negligence and the plaintiff therefore did not prove a case for a claim of state created danger. See *McClendon*, 305 F.3d. Most other circuits clearly would have ruled differently. 116 Harvard L. Rev. 1915.

The Fifth Circuit addressed the state created danger theory in *Piotrowski v. City of Houston. Piotrowski v City of Houston*, 237 F.3d 567 (5th Cir. 2001) as well. In *Piotrowski* plaintiff sued the City for constitutional violations that arose from the city's failure to protect her from her ex-boyfriend's attempts on her life. *Id.* at 567. The Fifth Circuit held that a plaintiff must prove that the state actors increased the danger to plaintiff and that the state actors acted with deliberate indifference. *Id.* at 584. Based on the language in *Piotrowski*, one could argue that the Fifth Circuit has accepted a version of the state created danger doctrine however the circuit has never confirmed this position. In fact, the *Piotrowski* court explicitly stated, "Although this court has discussed the contours of the state created danger theory on several occasions, we have never adopted that theory." *Id.* The Fifth Circuit continues

to skate around the issue once again by ruling that state created danger need not be addressed, because "even if we were to adopt it, Piotrowski could not recover." *Id.* A Supreme Court ruling is the only way that the status of the state created doctrine in the Fifth Circuit will be clarified. Without a ruling, Fifth Circuit courts will continue to circumvent the Supreme Court and avoid the issue.

The Fifth Circuit also touched on the state created danger doctrine in *Morin v. Moore. Morin v. Moore*, No. 01-40752 (5th Cir. 2002). In *Morin*, an assault rifle came into the possession of a police officer's son's very unstable hands through the extreme negligence of the City of Harlingen, Texas. *Id.* at 318. The unstable man used the rifle to murder two people. *Id.* The court in *Morin* ruled in favor of the defendants, much as it did in *McClendon*. *Id.* at 324. *Morin*, especially when taken in conjunction with *McClendon,* demonstrates that the defense in a state created danger case in the Fifth Circuit can use the ambiguity of the law to avoid liability when, in the interest of justice, liability should attach. Also in *Morin*, the court "assumes" what would be necessary for a successful state created danger claim. Assumption is all the Fifth Circuit can accomplish as it has failed to clearly establish law. *Id.* at 4. The Supreme Court can put an end to these "assumptions" by ruling on this case.

Yet another Fifth Circuit case that addressed state created danger is *Priester v. Lowndes County*, No. 02-60750 (5th Cir. 2004). In *Priester*, the Fifth Circuit states that, "we have clearly stated that this court has neither adopted nor rejected the state created danger theory." *Id.* at 5.

Until and unless the Supreme Court identifies a standard for the level of culpability necessary for a valid state created danger claim, there will be no objective yardstick by which to measure such claims for the requisite level of culpability. Because there is no standard, courts are free to rule as they please based on their interpretations of the necessary level of culpability. While it is clear that the actions of Texas A&M in *Scanlan* are enough to shock the conscience, they are not sufficiently different from the actions of the detective in *McClendon* or the defendants in *Morin*. In all of these cases state officials acted in a manner that could be described as conscience shocking. Both Texas A&M and the detective in *McClendon* acted with deliberate indifference to possible harms that could befall the plaintiffs. In *Scanlan*, Texas A&M officials conscientiously disregarded the danger that the unsupervised construction of the bonfire posed to students. In *McClendon*, the detective knowingly disregarded the danger to the plaintiff who he knew to be at odds with the informant to whom he gave the gun. The lack of a clear cut doctrine defining the requisite culpability for Fifth Circuit state created danger claims led to the opposing holdings in *Scanlan* and *McClendon*.

The *McClendon* dissent makes it clear that the Fifth Circuit has gone on a ten-year course of "back door" rejection of the state created danger doctrine, apparently because it does not want it to appear that they are the only circuit that does not recognize the state created danger doctrine. *McClendon*, 258 F.3d at 334. When confronted with what appears to be a state created danger claim, the Fifth Circuit has consistently indicated that the theory may be viable but that this particular plaintiff has not satisfactorily proved a state created danger claim

leaving this area of Fifth Circuit law in a "perpetual state of confusion." *Id.* The Fifth Circuit has had ample opportunities to rule on the state created danger doctrine, after all, at least seven state created danger cases have arrived in its courts over the last ten years. *Id.* A Supreme Court ruling on the issue of state created danger would require the Fifth Circuit to stop avoiding the issue and until this happens, the Fifth Circuit will remain in its state of unilaterally ignoring the doctrine.

The Fifth Circuit has utilized the concept of "deliberate indifference" to avoid ruling on the status of the state created danger doctrine within the jurisdiction. *Id.* at 335 There is not one universally accepted definition of "deliberate indifference." Courts can therefore interpret it to meet their own ends. *Id.* at 40. The Fifth Circuit has avoided taking a stand on defining what constitutes a state created danger claim by adapting their concept of "deliberate indifference" as it has suited the Court on individual cases. The Fifth Circuit has continuously circumvented a ruling on whether the substantive due process clause of the Constitution of the United States guarantees its citizens the right to freedom from acts of violence indirectly caused by a state official in which the official played an affirmative role in creating or exacerbating a dangerous situation which led to the citizen's injury. *Id.* at 40.

4. Right to Trial by Jury

Two of the fundamental rights guaranteed to all Americans are found in the First and Seventh Amendments to the U.S. Constitution – the freedom of the press and the right to trial by jury.

By abusing Rule 12(b)(6) and by ignoring the Supreme Court holding, and that of every other Circuit in America, other than itself, the Fifth Circuit treats the Seventh Amendment as if it were a bastard step-child. It is not!

All of our Federal Courts have done a superb job of enforcing the freedom of the press guarantees. But, our Courts generally, and the Fifth Circuit in particular, have allowed such an erosion of the right to trial by jury – guaranteed by the same Constitution – that it has become the source of severe criticism by legal scholars and even judges presently sitting on the federal bench. "The Fifth Circuit admits what it has been doing for some time. If at least two or three judges on a panel are left 'with a definite and firm conviction that a mistake has been made,' by the jury, then they assume the authority to disregard entirely the jury's factual findings and make their own findings – whether as to liability or damages." Honorable Sam Sparks, U.S. District Judge for the Western District of Texas and George Butts, Attorney at Law, DLA Piper Rudnick Gray Cary, *Disappearing Juries and Jury Verdicts*, 13 Voir Dire (Spring 2006) at 8.

There is a large contingence of sitting Fifth Circuit judges that seem to ignore the constitutional mandated right of jury trials. *Id.* at 8.

Mr. Rios's voice is not that of a frustrated, lonely litigant who is whimpering because of a mere adverse decision. The actions of the Fifth Circuit are creating a roar that must be heard and addressed by this Supreme Court. Judge Parker's dissent in *McClendon* is a loud and forceful call for attention to the lack of consensus on what a state official must do to "occasion" the damage to the third party. *McClendon v. City of Columbia,* 305 F.3d at

336. By accepting this case, the Supreme Court could clarify this very important area of law.

Judge Parker in his *McClendon* dissent says it plainly, "In refusing to make this decision [ruling on the state created danger claim], the majority attempts to create the illusion that no circuit split exists in hopes of avoiding Supreme Court scrutiny." *Id.* at 48. Judge Parker is not the only judge that has realized the problems currently plaguing the Fifth Circuit. Judge Stewart, a sitting Fifth Circuit judge, has said that the panel majority, under the guise of correcting errors of law, usurped the jury's Seventh Amendment function, replacing the jury's verdict with a verdict of its own. *Brown v. Parker Drilling Offshore Corp.*, No.03-30782, *reh'g en banc denied* (5th Cir. 2006) (Stewart, J., dissenting).

The Court should not allow the Fifth Circuit to circumvent ruling on the status of the state created danger doctrine within its jurisdiction any longer. As Judge Parker so eloquently puts it, "In failing to answer this fundamental question [whether the substantive component of the Due Process Clause guarantees a citizen the right to be free from acts of violence inflicted by a third party when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury] the majority shirks its constitutional duty." *McClendon*, 305 F.3d at 335.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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2006 WL 759795

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50774

RICARDO RIOS, II; MARISELA RIOS, Individually and as next friend of their minor children, Ricardo Rios III, Laura Yvette Rios and Ivn [sic] Alejandro Rios,

Plaintiffs-Appellees,

versus

THE CITY OF DEL RIO, TEXAS; ET AL.,

Defendants,

WESLEY WILSON; MANUEL HERRERA,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas.

(Filed March 27, 2006)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

This is an appeal from the denial of a motion to dismiss on the basis of qualified immunity.

Ricardo Rios II (Rios), joined by his wife and minor children, filed this suit in November 2003 against the City of Del Rio, Texas, its Chief of Police Manuel Herrera (Herrera), and its police officer Wesley Wilson (Wilson), seeking to recover, under 42 U.S.C. § 1983 and state law, damages for personal injuries sustained when, on the evening of June 30, 2002, Rios, then on duty as a U.S. Customs Enforcement Officer at the Del Rio Port of Entry, was struck by a City Police Department vehicle being driven by an escaping City prisoner, Reymundo Avalos (Avalos). The defendants jointly answered and filed a Rule 12(b)(6) motion to dismiss, Wilson and Herrera claiming qualified immunity. Following denial of the motion in July 2004, Wilson and Herrera timely brought this interlocutory appeal under *Mitchell v. Forsyth*, 105 S.Ct. 2806 (1985).[1]

The complaint asserts that "Mr. Rios was subjected to negligence, injury, gross misconduct and damages from the deadly use of force in violation of rights guaranteed to him by the Fourth and Fourteenth Amendments." It alleges that at all relevant times Wilson and Herrera were, respectively, City of Laredo police officer and Chief of Police, acting within the course and scope of their employment, and – under the heading "FACTS" – the following:

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[1] The magistrate judge ruled on the motion to dismiss, the parties having agreed to proceed before him under 28 U.S.C. § 636(c). The magistrate judge amended the order to correct a clerical error, noting that the Fourth Amendment claim against the City was dismissed. The City also filed a timely notice of appeal but subsequently on its motion we dismissed its appeal.

"4.2 On June 30, 2002, Mr. Rios was thirty-six years old and he was on-duty as a U.S. Customs Enforcement Officer at the Del Rio Port of Entry along the United States border with Acuna, Coah., Mexico when he was struck and severely injured by a City Police Department patrol unit driven by an escaping prisoner, Mr. Reymundo Avalos.

4.3 Customs Officers at the Del Rio Port of Entry, including Mr. Rios, were responding to the City Police Department's request for assistance in intercepting a car chase which commenced at 617 Holt Street.

4.4 Mr. Reymundo Avalos was an adult person who had a criminal history in the City including a penchant or tendency to escape police custody which was well known to the police officers of the City Police Department, and he was known by the nickname around the City Police Department as "Houdini."

4.5 On the evening of June 30, 2002, Reymundo Avalos, had been placed under arrest by Officer Wesley Wilson.

4.6 Officer Wilson improperly left the prisoner Reymundo Avalos in the backseat of his patrol vehicle while the keys were in the ignition and the engine running while he visited with a person who lived in the neighborhood.

4.7 Mr. Avalos escaped from confinement in the rear sat [sic], commandeered the patrol car, and sped away.

4.8 The City Police Department issued an "all points alert" on the escaping prisoner, Reymundo

> Avalos, and proceeded to channel Reymundo Avalos towards the International Bridge.
>
> 4.09 The City Police Department did not clearly inform the Del Rio Port of Entry Customs Officers that the vehicle being driven by Reymundo Avalos was an official marked patrol car of the City Police Department.
>
> 4.10 Del Rio Police Department officers pursued the patrol car being driven by Reymundo Avalos and had opportunities to divert or disable that vehicle, but failed to do so.
>
> 4.11 As the stolen vehicle driven by Reymundo Avalos approached the open lane, the vehicle violently struck Mr. Rios.
>
> 4.12 Mr. Rios sustained devastating injuries from the violent impact by that vehicle. . . ."

It is also alleged that "[t]he City" was "acting with deliberate indifference . . . breaching their duty to provide Officer Wilson with adequate supervision and training regarding the reasonable containment of prisoners in custody" and that "[t]he facts stated" in the "Facts" section of the complaint "constitute intentional, deliberate, and conscious indifference to well-known standards in the management of the City Police Department in the training on, demonstrated proficiency in, and the safe handling of individuals in custody. . . ."

Additional allegations are that "Officers of the City Police Department were aware of previous attempts of the prisoner to flee from their custody," "were aware that their actions increased danger to others including Mr. Rios" and "were aware of department and state law" [citing Tex. Trans. Code § 545.404] "that an operator of a motor vehicle

may not leave a vehicle unattended without" stopping the engine, locking the ignition and removing the key from the ignition. It is also alleged that "Defendants acted with deliberate indifference to Mr. Rios' safety, by creating an environment which would not have existed for the crime to occur otherwise," and that

> "7.1 . . . with an intentional, a deliberate, and a conscious indifference to the lives and safety of other persons, including Mr. Rios, the City adopted or maintained, through its final policy-makers, unconstitutional policies and customs, and failed to implement constitutional and proper policies and procedures, which proximately caused or resulted in the violation of the constitutional rights of Mr. Rios. . . .
>
> 7.2 Officer Wilson acted willfully, deliberately, maliciously, or with reckless disregard for Mr. Rios' constitutional rights when, with knowledge of Reymundo Avalos' previous attempts to flee police custody, Officer Wilson left Mr. Avalos unattended in an operative police unit on June 30, 2002."

DISCUSSION

Standard of Review

Our review of a district court's decision on a 12(b)(6) motion is, as we said in *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995):

> " . . . *de novo*, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to [the plaintiff]. *Walker v. S. Cent. Bell Tel. Co.*, 904 F.2d 275, 276 (5th Cir. 1990); *Heaney v. United States Veterans Admin.*, 756

> F.2d 1215, 1217 (5th Cir. 1985) . . . . dismissal [is not proper] ' "unless it appears beyond doubt that [the plaintiff] can prove no set of facts in support of [her] claim which would entitle [her] to relief." ' *Heaney,* 756 F.2d at 1217 (quoting *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). However, 'the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.' 3 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1216 at 156-159 (footnote omitted). '[A] statement of facts that merely creates a suspicion that the pleader might have a right of action' is insufficient. *Id.* at 163 (footnote omitted). 'Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief . . . " 2A MOORE'S FEDERAL PRACTICE ¶ 12.07 [2.-5] at 12-91 (footnote omitted). The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint. *Gooley v. Mobil Oil Corp.,* 851 F.2d 513, 514 (1st Cir. 1988). Further, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.' *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993)."[2]

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[2] *See also, e.g., Drs. Bethea, Moustoukas v. St. Paul Guardian Ins.,* 376 F.3d 399, 403 (5th Cir. 2004) ("conclusory allegations or legal conclusions masquerading as factual conclusions"); *Taylor v. Books A Million, Inc.,* 296 F.3d 376, 378 (5th Cir. 2002) (same); *Jones v. Alcoa Inc.,* 339 F.3d 359, 363 n.4 (5th Cir. 2003) ("conclusory allegations or

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Where the issue is one of qualified immunity, *Saucier v. Katz,* 121 S.Ct. 2151 (2001), states the relevant test as follows:

> "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?
>
> . . .
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* at 2156.[3]

Constitutional violation; state-created danger

The complaint makes plain that Rios asserts a Fourteenth Amendment substantive due process right to be free from state deprivation of his bodily integrity liberty

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unwarranted deductions of fact" not accepted as true); *Kane Enterprises v. MacGregor (USA),* 322 F.3d 371, 374 (5th Cir. 2003) (same).

And see WRIGHT & MILLER FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1216: "As one district court put the matter: '. . . if a pleader cannot allege definitively and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court.'" (*id.* at 227, 229-30; footnote omitted, quoting *Daves v. Hawaiian Dredging Co.,* 114 F. Supp. 643, 645 (D.C. Haw. 1953)).

[3] *See also, e.g., Morin v. Moore,* 309 F.3d 316, 319 (5th Cir. 2002) (in appeal from order denying Rule 12(b)(6) motion raising qualified immunity our review is "*de novo,* accepting all well-pled facts as true").

interest.[4] In *DeShaney v. Winnebago County,* 109 S.Ct. 998 (1989), the Court held that "[a]s a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," but recognized an exception respecting individuals in certain "special relationships" with the state, *id.* at 104, an exception which it described and explained as follows:

> "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id.* at 1006.

Rios was injured from being struck by the patrol car "driven by an escaping prisoner, Mr. Reymundo Avalos" who had earlier "commandeered" the vehicle after having "escaped from confinement in the rear seat . . . and sped away." Obviously, Avalos is a purely private party not in any sense acting under color of law, and nothing in the complaint suggests otherwise. Moreover, it is likewise obvious that Rios was not incarcerated or institutionalized or under "other similar restraint of personal liberty" so as to be within the noted "special relationship" exception to *DeShaney.* Rios does not contend otherwise.

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[4] While the complaint also references the Fourth Amendment, none of the facts alleged even suggest that Rios was ever subjected to a search or seizure by anyone, and the Fourth Amendment is plainly not implicated. *See County of Sacramento v. Lewis,* 118 S.Ct. 1708, 1715 (1998). *See also id.* at n.7. Rios does not argue otherwise.

Rather, Rios seeks to invoke another purported exception to *DeShaney,* namely what has been referred to as the "state-created danger" theory. As we noted in *McClendon v. City of Columbia,* 305 F.3d 314, 327, 330-32 (5th Cir. 2002) (en banc), this court has frequently spoken of the "state-created danger" theory, and has discussed its various permutations and requirements as applied in other circuits, but neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder. *See, e.g., Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1093 liability"); *Rivera v. Houston Independent School District,* 349 F.3d 244, 249 (5th Cir. 2003) ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause"); *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) ("Although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory"); *Randolph v. Cervantes,* 130 F.3d 727, 731 (5th Cir. 1997) ("The state-created danger theory has not been adopted in this Circuit"); *Johnson v. Dallas I.S.D.,* 38 F.3d 198, 201 (5th Cir. 1994) ("no Fifth Circuit case has yet predicated relief on a state created danger theory"); *Leffall v. Dallas I.S.D.,* 28 F.3d 521, 530 (5th Cir. 1994) ("We have found no cases in our circuit permitting § 1983 recovery for a substantive due process violation predicated on a state-created danger theory").

Rios contends, however, that *Scanlan v. Texas A&M Univ.,* 343 F.3d 533 (5th Cir. 2003), adopted the state-created danger theory. It is certainly not clear that

Scanlan purports to do so. There the panel primarily addressed the district court's error in considering matters outside the complaint in granting a Rule 12(b)(6) dismissal. The *Scanlan* panel did cite the *Johnson* and *Piotrowski* opinions respecting what would be required to make out a state-created danger claim,[5] and stated that the plaintiffs had adequately pled the there referenced required elements thereof; however, this discussion was introduced by the statement that "this Court has never explicitly adopted the state-created danger theory," *Scanlan* at 537, and *nowhere* in the opinion does the court expressly purport to adopt or approve that theory. At least two subsequent panels have construed *Scanlan* as *not* adopting the state-created danger theory. *See Beltran* at 307 (citing *McClendon* and *Scanlan* as examples of our refusal to recognize a state-created danger theory); *Rivera* at 249 n.5 ("In *Scanlan* . . . [d]espite remanding that case . . . for further proceedings, we did not recognize the state created danger theory"). We need not, however, ultimately resolve the meaning of *Scanlan* because, as explained below, prior decisions of this court more specifically on point here than *Scanlan* (and not cited in *Scanlan*) are controlling in the present setting.[6]

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[5] *Scanlan* does not cite *McClendon*.

[6] In this connection we assume, *arguendo* only, that the en banc court's statement in *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995), that

> " . . . we hold that a 'special relationship' arises between a person and the state *only* when this person is involuntarily confined against his will through the affirmative exercise of state power. *Absent this 'special relationship,'* the state has *no duty* to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment

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Officer Wilson

The *only* conduct, or inaction, alleged respecting Officer Wilson, and the only fault or wrongdoing sought to be charged to him, is that on the evening in question, after he had placed Avalos under arrest, he "improperly left the prisoner . . . Avalos in the backseat of his patrol car while the keys were in the ignition and the engine running while he visited with a person who lived in the neighborhood," that as a result "Avalos escaped from confinement in the rear seat, commandeered the patrol car, and sped away," and that "Wilson acted willfully, deliberately, or with reckless disregard for Mr. Rios' constitutional rights when, with knowledge of Reymundo Avalos's previous attempts to flee police custody, Officer Wilson left Mr. Avalos unattended in an operative police unit." It is not alleged that in so leaving the vehicle unattended Wilson knew or believed that Avalos would likely drive the vehicle to the Del Rio Port of Entry or would more likely endanger anyone there as opposed to any other member of the general public in or around the streets of Del Rio or its environs. In fact, the contrary is to be inferred by the allegations that the "Police Department . . . proceeded to channel Reymundo Avalos towards the International Bridge" and that the police officers pursuing the "stolen" patrol car driven by Avalos "had opportunities to divert or disable the vehicle, but failed to do so." It is not alleged Wilson participated in the pursuit of Avalos or requested assistance from any Customs Officers in intercepting Avalos or that he had

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from violence at the hands of a private actor." (emphasis added)

does not constitute an across-the-board preclusion of application of the "state-created danger" theory in every conceivable factual context.

anything to do with the wording or transmission of the "all points alert" or the failure to "clearly inform" Customs Officers that the vehicle was a police department "official marked patrol car." There is no allegation that any alleged action or failure to act on the part of Wilson was taken by him with the actual purpose or intention of causing injury to *anyone,* much less Rios whom it is not alleged Wilson in any way knew or even knew of.

Our decisions make clear that the facts alleged do not show that Wilson's conduct violated any constitutional right. In *Saenz v. Heldenfels Bros. Inc.,* 183 F.3d 389 (5th Cir. 1999), the plaintiffs were injured when a (private actor) drunk drove his truck into the plaintiffs' oncoming vehicle, and we held there was no constitutional violation on the part of a senior deputy sheriff who had ordered his junior deputy not arrest or investigate (as the junior wanted to) the truck driver, whom both believed to be drunk as he sat in his vehicle (just in front of the deputies) at a stop sign for some 15 minutes and was known to be "always drunk" and "stopped for that" and had eventually pulled away making "a wide right turn." "A few minutes later" the drunk drove his truck into the plaintiffs' vehicle. *Id.* at 390. Relying on *DeShaney,* we held that the allegations did not "state a constitutional claim." *Id.* at 391. We rejected application of the state-created danger theory stating that the defendant senior deputy "was neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the appellants from receiving aid. This 'state-created danger' theory is inapposite without a known victim," and that a state officer "cannot offend due process by permitting an intoxicated driver to remain on the highway, thereby increasing the risk of harm to unidentified and unidentifiable members of

the public." *Id.* at 392. The same principles apply here and dictate the conclusion that Wilson's conduct violated no constitutional right.

We made a similar holding in *Morin v. Moore,* 309 F.3d 316 (5th Cir. 2002), where the son of defendant police officer Moore shot the plaintiffs using an AK-47 assault rifle which officer Moore had procured from the Police Department and stored in his son's bedroom notwithstanding that he, and the defendant police officer who furnished him the weapon, knew that the son was a psychologically unstable drug user who revered Nazi ideology, and officer Moore, the night before the shooting, had kicked his son's former girlfriend out of his house, knowing both that she had a new boyfriend and that the son was looking for the new boyfriend (a plaintiff victim of the shooting). We affirmed the district court's Rule 12(b)(6) dismissal of the complaint, noting that "the allegations in this case do not show specific knowledge of a harm to a known victim." *Id.* at 323.[7]

Relatedly, we have rejected section 1983 liability in instances where the alleged deliberate indifference of police allowed a prisoner or prisoners to injure an officer. In *Hogan v. City of Houston,* 819 F.2d 604 (5th Cir. 1987), a pre-*DeShaney* decision, we affirmed a Rule 12(b)(6) dismissal of a section 1983 complaint alleging that "certain policies" of the City and its Chief of Police respecting "procedures in the prisoner intake facility, allowed a

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[7] *See also Lester v. City of College Station,* 103 Fed. App. 814 (5th Cir. 2004) ("even if it is assumed that the state-created danger theory applies, liability exists only if the state actor is aware of an immediate danger facing a known victim" and does *not* extend to "all foreseeable victims").

prisoner to grab another officer's gun and shoot [plaintiff, officer] Hogan with it" and that such policies " 'manifest deliberate indifference to or conscious disregard' for the safety of officers . . . on the part of the [defendants] City and [its] Chief of Police." *Id.* We held no constitutional violation was alleged.

In *deJesus Benavides v. Santos,* 883 F.3d 385 (5th Cir. 1989), one of our first decisions to consider *DeShaney,* we affirmed the Rule 12(b)(6) dismissal of a section 1983 complaint by county jail guards who while on duty and unarmed were shot by prisoners attempting to escape; defendants were the sheriff, employer of the guards, as well as the county commissioners and county judge. The complaint alleged that the sheriff had been warned by the DEA nearly two weeks before that a jailbreak was imminent and was also aware of a persistent pattern on contraband smuggling into the jail, but nevertheless the defendants, in "callous indifference" to the safety of the guards, failed to take any appropriate action to prevent or adequately prepare against, or protect the guards from, the attempted escape and accompanying inmate violence. We held that dismissal was required under *DeShaney*'s general rule that " 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.' " *Id.,* 883 F.2d at 387 (quoting *DeShaney,* 109 S.Ct. at 1004). We likewise noted that *DeShaney* "confirms" our earlier holding in *Hogan. Id.,* 883 F.2d at 387. Both *Leffall,* 28 F.3d at 528, and our en banc opinion in *Walton,* 44 F.3d at 1304, rely on *deJesus Benavides* for our holdings that there was no constitutional violation when state actors were deliberately indifferent to, and wrongfully failed to protect from private

violence, individuals with whom the state was not in the requisite special relationship described in *DeShaney.*

These decisions – *Saenz, Morin, Hogan,* and *deJesus Benavides* – were all rendered before *Scanlan* and (except for *Hogan*) after *DeShaney,* and they plainly dictate the conclusion that Wilson's alleged conduct violated no constitutional right of Rios's; nothing in *Scanlan,* however it is interpreted, can change that and we are bound to follow those pre-*Scanlan* decisions.[8]

We conclude that no constitutional violation on the part of Wilson was alleged and that accordingly the district court should have granted, and erred by denying, Wilson's Rule 12(b)(6) motion to dismiss the section 1983 claims against him on the basis of qualified immunity.

Chief Herrera

The complaint alleges absolutely *no* facts whatever regarding Chief Herrera, either by name or by position (such as "Chief" or "Chief of Police"), *except* that he "resides in Del Rio, Texas," and "[a]t all relevant times he was the Chief of the City Police Department" and, along

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[8] The rule in this circuit is that where two previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit (absent an intervening holding to the contrary by the Supreme Court or this court en banc). *See, e.g., Billiot v. Puckett,* 135 F.3d 311, 316 (5th Cir. 1998). The binding force of earlier opinions extends to alternative holdings but not to *obiter dictum. In Re Hearn,* 376 F.3d 447, 453 & n.5 (5th Cir. 2004). However, "no panel is empowered to hold that a prior decision applies only on the limited set of facts set forth in that opinion," *U.S. v. Smith,* 354 F.3d 390, 399 (5th Cir. 2003), and a prior panel's explication of the rules of law governing its holdings may not generally be disregarded as dictum. *Gochicoa v. Johnson,* 238 F.3d 278, 286 n.11 (5th Cir. 2000).

with Wilson and "[t]he officers and employees of the City," was "at all times relevant acting in bona fide pursuance of general authority to perform for the City on the subjects and matters to which their acts relate and are imputed to the City."

There is no vicarious or *respondeat superior* liability of supervisors under section 1983. *Thompkins v. Belt,* 828 F.2d 298, 303-04 (5th Cir. 1987). "Rather, a plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a 'sufficient causal connection' between the supervisor's conduct and the constitutional violation." *Evett v. Detntff,* 330 F.3d 681, 689 (5th Cir. 2003). It is facially evident that this test cannot be met if there is no underlying constitutional violation.[9] *Breaux v. City of Garland,* 205 F.3d 150, 161 (5th Cir. 2000) ("the fact that Plaintiff's First Amendment rights were not actually infringed exonerates Holified from supervisory liability"). We have held that we "use the same standard in assessing an individual supervisor's liability under § 1983" as that used "in assessing a municipality's liability" thereunder. *Doe v. Taylor ISD,* 15 F.3d 443, 453 (5th Cir. 1994) (en banc) (*see also id.* at 454, supervisor's deliberate indifference to subordinate's wrongdoing must have "caused a constitutional injury to the" plaintiff). In *Collins v. City of Harker Heights,* 112 S.Ct. 1061 (1992), the Court held that "proper analysis requires us to separate two different issues when a section 1983 claim is asserted against a municipality: (1) whether plaintiff's

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[9] Even apart from this deficiency, the complaint alleges *nothing* on the part of Herrera other than the fact that he was Chief of Police "at all relevant times." That itself renders the complaint insufficient to state a § 1983 claim against Herrera.

harm was caused by a constitutional violation, and (2) *if so,* whether the City is responsible for that violation." *Id.* at 1066 (emphasis added). *Collins* went on to hold that because there was no underlying constitutional violation,[10] Rule 12(b)(6) dismissal was proper *even though* (as the Court assumed *arguendo*) "the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the City for the tortious conduct of its agents." *Id.* at 2068.[11] *See also DeShaney,* 109 S.Ct. at 1007 n.10 (because the county employee social workers did not violate child's constitutional rights by failing to protect him from private actor violence "we have no occasion to consider ... whether the allegations in the complaint are sufficient to support a § 1983 claim against the county ... "); *City of Los Angeles v. Heller*, 106 S.Ct. 1571, 1573 (1986) (no case "authorizes the award of damages against a municipal corporation based on the actions of one of its officers when ... the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point"); *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2436 n.8 (1985). And, clearly controlling on this issue is our above discussed decision in

[10] The plaintiffs' decedent, a City employee, lost his life because the City, despite being on notice of the risks, systematically and intentionally failed to provide minimal safety training and equipment required by state law.

[11] *See also id.* at 1067-68: stating that in *Canton v. Harris*, 109 S.Ct. 1197 (1989), "we concluded that *if* a city employee violates another's constitutional rights, the city may be liable *if* it had a policy or custom of failing to train its employees and that failure to train caused *the constitutional violation.*" (emphasis added).

Saenz where, citing *Heller*, we rejected recovery sought against the county on the basis of its alleged "custom or policy permitting Gonzales to interfere with junior officers' attempts to apprehend drunk drivers" because we held that, under *DeShaney*, Deputy Gonzalez's preventing the arrest of the drunk driver (who minutes later ran into plaintiffs) did not violate plaintiffs' constitutional rights. *Saenz*, 183 F.3d at 392-93.[12]

Finally, the complaint fails to state a claim against Chief Herrera for yet another separate and independent reason. We have frequently held that supervisor liability under section 1983 requires a showing of the supervisor's "deliberate indifference to the known or obvious fact that such constitutional violations would result" and "[t]hat 'generally requires that a plaintiff demonstrate at least a pattern of similar violations.'" *Johnson v. Deep East Texas Regional Narcotics*, 379 F.3d 293, 309 (5th Cir. 2004). *See*

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[12] The only training or supervision deficiencies even generally alleged in the complaint are those relating to "containment of prisoners in custody," "safe handling of individuals in custody," and the requirement that the operator of a motor vehicle not leave it unattended without stopping the engine, locking the ignition and removing the key from the ignition. These relate only to Wilson's alleged conduct which we hold did not violate the Constitution.

It is also alleged that "City Police Department" thereafter did "channel" the fleeing Avalos "towards the International Bridge," "had opportunities to divert or disable" the stolen patrol car "but failed to do so," and did not "clearly" inform Customs officers that vehicle was "an official marked patrol car." None of these actions or omissions are alleged to be improper; nor is it alleged that any of such matters resulted from any police department custom or policy or inadequate training or supervision, nor is any custom or policy or inadequate (or other) training or supervision in relation to any of such matters alleged. Nor do any of such allegations referenced in this paragraph state a constitutional violation. *See County of Sacramento v. Lewis*, 118 S.Ct. 1708 (1998); *DeShaney; Saenz.*

also, e.g., Estate of Davis v. City of North Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005); *Burge v. St. Tammany Parish,* 336 F.3d 363, 370 (5th Cir. 2003); *Cousin v. Small,* 325 F.3d 627, 637 (5th Cir. 2003). Here there is *no* allegation of *any* prior incident in which *any* arrestee or prisoner ever commandeered (or even attempted to commandeer) a police car, much less that any such ever resulted in any injury to another person. Nor is any other *fact* alleged which would tend to indicate that Chief Herrera had the deliberate indifference necessary for supervisory liability.

We conclude that no constitutional violation on the part of Chief Herrera is alleged,[13] and that accordingly the district court should have granted, and erred by denying,

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[13] We also note that plaintiffs, after receiving certain documentary discovery (including police department incident reports concerning the subject events of June 30, 2002), and subsequently having taken the deposition of a police Lieutenant Lissner who came upon Avalos while he was still in Wilson's vehicle and later pursued Avalos after he escaped in Wilson's vehicle, moved in June 2004 to file an amended complaint in which the only change mentioned in the motion (the proposed amended complaint is not in the record) is the dropping of Chief Herrera as a defendant and the adding of Lissner as a defendant. The motion asserts that "Police Chief Herrera was not involved in the arrest and chase of Reymundo Avalos. Thus, Plaintiffs have no reason to nor intention of continuing to pursue their claims against Police Chief Herrera" and that the motion should be granted "because the amended pleading is appropriate to dismiss a party against whom Plaintiffs has [sic] no claim." The district court did not rule on the motion and was apparently unaware of it as is not mentioned in the court's July 14 order overruling the 12(b)(6) motions (or in subsequent clerical correction thereof). After the court's July 14 order plaintiffs in effect withdrew the request to amend and asserted to the court that "in light of this court's order of July 14, 2004, Chief Herrera should not be dismissed at the present time" but that "Lt. Lissner" should be made "an additional Defendant along with Defendants Officer Wilson and Chief Herrera." So far as the record reflects there has been no ruling making Lt. Lissner a party.

Herrera's Rule 12(b)(6) motion to dismiss the section 1983 claims against him on the ground of qualified immunity.

CONCLUSION

Because the facts alleged in the complaint, taken in the light most favorable to plaintiffs, do not show that either Wilson or Herrera violated Rios's federal constitutional rights, the district court should have granted, and erred in overruling, the qualified immunity based Rule 12(b)(6) motion of Wilson and Herrera as to Rios's section 1983 claims against them; and the district court's order overruling that motion is accordingly hereby REVERSED. As claims against the City and state law claims against Wilson and Herrera remain, the case is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

RICARDO RIOS II, et al. *
*
v. * **CIVIL NO. DR-03-CA-102**
*
CITY OF DEL RIO, TEXAS, et al. *

ORDER

(Filed Aug. 3, 2004)

On July 14, 2004, the undersigned issued an order denying defendants' motion to dismiss. Pages nine and ten of that order showed that Plaintiffs have not established that the City of Del Rio violated Plaintiffs' Fourth Amendment right against unreasonable search and seizure. However, the conclusion of that order inadvertently provided that the City of Del Rio's motion to dismiss was denied. Due solely to that clerical error, the Court hereby **ORDERS** that the conclusion to the July 14, 2004, order be **AMENDED** *nunc pro tunc* to reflect that the motion to dismiss is **GRANTED** as to Plaintiffs' Fourth Amendment search and seizure claim against the City of Del Rio but is **DENIED** in all other respects.

SIGNED this 3d day of August, 2004.

/s/ Dennis G. Green
DENNIS G. GREEN
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

RICARDO RIOS II and MARISELA RIOS, Individually and as Next Friend Of ther [sic] Minor Children; RICARDO RIOS III, AURA YVETTE RIOS, And IVAN ALEJANDRO RIOS	§	
Plaintiffs	§	
v.	§	**CIVIL NO.**
	§	**DR-03-CA-102-AMI/DG**
CITY OF DEL RIO, TEXAS, WESLEY WILSON and MANUEL HERRERA,	§	
Defendants	§	

ORDER

(Filed Jul. 14, 2004)

Pending is a motion to dismiss filed by defendants CITY OF DEL RIO, TEXAS, WESLEY WILSON, AND MANUEL HERRERA (herein "defendants") against plaintiffs RICARDO RIOS II AND MARISELA RIOS, INDIVIDUALLY AND AS NEXT FRIEND OF THEIR MINOR CHILDREN: RICARDO RIOS III, LAURA YVETTE RIOS, AND IVAN ALEJANDRO RIOS, (herein "plaintiffs) After examining the motion, plaintiffs' response, and the applicable law, the undersigned finds that the motion should be denied.[1]

[1] All parties have consented to this Magistrate Judge conducting all proceedings in this action.

Background and Statement of the Case

Before looking to the facts of the case, the Court notes that under Federal Rule of Civil Procedure 12(b)(6), it must construe all allegations in a complaint in a light most favorable to the plaintiffs. Additionally, the Court assumes that all well-plead facts from the pleadings are true. *Albright v. Oliver*, 510 U.S. 266, 267, 114 S.Ct. 807, 810 (1994); *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683 (1974); *Leleux v. United States,* 178 F.3d 750, 754 (5th Cir. 1999); *Crowe v. Henry,* 43 F.3d 198, 203 (5th Cir. 1995). Additionally, the Court must not go outside the pleadings. *Scheiler v. Rhodes,* 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S.Ct. 1683 (1974); *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 147 (5th Cir. 1997); *Capital Parks, Inc. v. Southeastern Adver. & Sales Sys., Inc.* 30 F.3d 627, 629 (5th Cir. 1994).

Plaintiffs in the instant action have stated a claim under 42 U.S.C. Section 1983 for the alleged deprivation of rights of Plaintiffs caused by Defendants. The events at issue occurred on June 30, 2002, Plaintiff Ricardo Rios II was on duty as a U.S. Customs Enforcement Officer at the Del Rio Port of Entry. On that day, Rios was struck and severely injured by an escaped prisoner, Reymundo Avalos, who was driving a stolen Del Rio City Police Department patrol unit.

Defendants claim that plaintiffs have failed to state a claim and assert the privilege of qualified immunity.

Discussion

A cause of action under 42 U.S.C. Section 1983 is provided for when an individual has been "deprived of any

rights, privileges, or immunities secured by the Constitution and laws" by a person or entity acting under color of state law. 42 U.S.C. Section 1983 (1994). However, a plaintiff must clear several hurdles before a suit can be maintained against a governmental entity.

The Supreme Court has established that government officials who are performing discretionary duties are generally shielded from civil liability as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982). In *Anderson v. Creighton,* the Court further clarified this qualified immunity test. See 483 U.S. 635, 639, 97 L.Ed. 2d 523, 107 S.Ct, 3034 (1987). A state actor is entitled to qualified immunity if his or her conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of his or her actions". Id.

I. Step One: A Violation of Federal Constitutional or Statutory Law

The first step in analyzing a Section 1983 claim is to assess whether a constitutional violation could have occurred based upon the facts and circumstances alleged. *Saucier v. Katz,* 533 U.S. 194, 200, 150 L.Ed. 2d 272, 121 S.Ct. 2151 (2001).

In the instant case, plaintiffs allege that the defendants violated Plaintiff Rios's substantive due process rights under the Fourteenth Amendment. Specifically, they claim that the deadly use of force that injured Plaintiff Rios was created by the City of Del Rio through its lack

of adequate training and supervision and acting with deliberate indifference towards the plaintiff.

Generally, the Constitution imposes no duty on states to provide protective services or otherwise prevent violence by private actors. There are two circumstances, however, where, a due process deprivation could occur, provided that the state actor has the requisite mental state. First, a procedural or substantive due process violation could occur if uncommon circumstances create a duty for the state to protect a particular person. *Silas v. Carpenter* 980 F. 2d 299 (5th Cir. 1992).

The duty to protect a particular person has been interpreted to include those situations where the state creates the danger faced by a third party. *Deshaney v. Winnebago*, 489 U.S. 189; 109 L.Ed. 998 (1989), (stating that no duty arose in that particular instance because the state did not play a part in their creation and did it [sic] do anything to render him any more vulnerable to them).

The Supreme Court created a foundation for the state-created danger theory at issue here when they stated that the general rule of qualified immunity is to provide government officials with the ability to "anticipate when their conduct may give rise to liability for damages. *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987) citing *Davis et. al. v. Sherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). The official may look to "current American law" to determine their actions. *Anderson v. Creighton,* 483 U.S. at 646. The Court further clarified their statements by stating that it refused to "complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of

various officials' duties or the precise character of the particular rights alleged to have been violated." Id.

Taking lead from the Supreme Court decisions in *Anderson,* 483 U.S. at 640, the Fifth Circuit in *McClendon v. City of Columbia* asked whether cases in other circuits could establish the substantive due process right of freedom from state-created danger and whether they are fair warning in this circuit to establish the requisite "objective legal reasonableness" in order to establish a claim under Section 1983. 305 F.3d 314 (5th Cir. 2002). The court found that there was no court at the time that it heard the case that had applied the state-created danger theory to a factual situation similar to that case and that the police could not have been warned that their actions would violate Constitutional law. Id.

While not explicitly adopting the theory at the time, in 1994, the Fifth Circuit set forth the necessary elements in order to prevail under the state-created danger theory: "the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's action to occur. *Johnson v. Dallas Indep. Sch. Dist.*, 38 F. 3d 198, 201 (5th Cir. 1994).

II. Step Two: Was the law clearly established?

The next step in a qualified immunity analysis is to assess whether an official, who is otherwise protected, may be held personally liable for an allegedly unlawful action based on the "objective legal reasonableness" of the action *Harlow v. Fitzgerald,* 457 U.S. at 819; *Hare v. City of Corinth,* 135 F.3d 320, 325 (5th Cir. 1998). This reasonableness

is assessed in light of the legal rules that were "clearly established" at the time it was taken, id at 818. See *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987). The general rule of qualified immunity is intended to provide government officials with the ability "reasonably to anticipate when their conduct may give rise to liability for damages". *Anderson* at 638 citing *Davis* 468 U.S. at 195. This is an objective test, we do not look to the state of mind of the actor here, but rather in an additional step, dealt with next.

The specific question the court faces at this point is whether the state-created danger theory is recognized as a viable 1983 complaint in this Circuit. The Fifth Circuit has yet to specifically adopt this "state-created danger" theory in a factually similar circumstance. See *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F. 3d 1412, 1415 (5th Cir. 1997) (en banc), *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002); *Johnson v. Dallas I.S.D.*, 38 F.3d 198; *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001). However, the court suggested that the district court should not have dismissed an action for failure to state a claim under 1983 based on state-created danger. *Scanlan v. Tex. A & M Univ.,* 343 F.3d 533 (5th Cir. 2003). The court has also noted in the past that courts have found a denial of due process when the state created the faced dangers. *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992).

The *Salas* case is notable for another reason, however. There, the court did not find that there was a state-created danger. Instead, the plaintiff's position was not made worse by the official's actions, but simply ran its course, as if the official had not been present. It is here where the case at issue can be distinguished. In the instant case, it has been alleged that the official created the situation by

leaving a known escape artist alone in a running police vehicle. Additionally, the all-points bulletin did not warn the plaintiff that the car stolen was actually a police vehicle. The plaintiffs allege that these factors were due to a failure to train and lack of adequate policy. At this stage, the court must take the pleadings at face value.

The Court cannot ignore the other circuits, who have continually held that the state created danger theory is viable as a cause of action. The Fourth Circuit's test, like the Fifth Circuit, creates a need for an affirmative act on the part of the defendant. *Stevenson v. Martin County Board of Education*, 3 Fed. Appx. 25 (4th Cir. 2001). The Ninth Circuit adopted the test in a Section 1983 context when police officers left a woman on the side of the road after impounding her vehicle and she was later raped. *Wood v. Ostrander,* 879 F.2d 583, 590 (9th Cir. 1989). The Tenth Circuit case, *Sutton v. Utah State School,* 173 F.3d 1226 (10th Cir. 1999) specifically dealt with actual notice of a crime on school grounds, and the subsequent failure to train.

Defendants cite another case that establishes guidelines that they do not think Plaintiffs can reach. In *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996), the court speaks of violating the rights of a member of a specifically definable group as well as a conscience-shocking test. However, the Fifth Circuit has already spoken on the issue, stating only that uncommon circumstances can create a duty for the state to protect a particular person. *Salas v. Carpenter* 980 F. 2d 299 (5th Cir. 1992).

At this juncture we must determine the adequacy of the plaintiffs' claims based on the possibility of a state-created danger theory. The specific policies and actions

that will be at issue in this case have yet to be fleshed out so that they can be acknowledged or denied by previous holdings in this Circuit.

III. The Culpable Mental State Deliberate Indifference

As the plaintiffs established a theory of liability, we must now turn to the third and final prong of the analysis for qualified immunity. This is the subjective test. The plaintiffs cannot overcome the claim of qualified immunity unless the state official is shown to have acted with "culpability beyond mere negligence" *McClendon v. City of Columbia*, 305 F. 3d 314 at 326 (5th Cir. 2002). The official must have acted with deliberate indifference towards the plaintiff. Id. As defined by the Supreme Court, the term "deliberate indifference" means that a state actor must "know of and disregard an excessive risk to (the victim's) health or safety. Id (quoting *Farmer v. Brennan*, 511 U.S. 325, 837, 114 S.Ct. 1970, 128 L.Ed. 811 (1994). Failure to alleviate a significant risk that was not actually perceived by the state actor does not qualify as deliberate indifference.

The Fifth Circuit set forth two ways a plaintiff may prove deliberate indifference in a failure to train case, as plaintiffs in the instant case have alleged. *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989).

Plaintiff may - 1) show that the municipality has deliberately or consciously chosen not to train its officers despite being on notice that is current training policy has

not prevented tortious conduct by its officers; or 2) showing a single incident along with the proof of the possibility of recurring situations that present the obvious potential for a violation of constitutional rights as well as the need for additional and/or different police training. 489 U.S. 378, 390, 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989)

If the allegations pled by the plaintiffs are construed in a light most favorable to them, then it can be determined that plaintiffs have sufficiently pled a section 1983 case under the state-created danger theory. Plaintiffs plead that the prisoner Avalos was placed under arrest, then subsequently left in the backseat of a patrol vehicle with the keys in the ignition. The prisoner Avalos was referred to "around the City Police Department as 'Houdini'". Plaintiffs' Original Complaint pg. 5. This nickname was in reference to Avalos's ability to escape police custody. Additionally, while the Police Department issued an alert on the escaped prisoner, they allegedly did not inform the Port of Entry Officers that the vehicle was an officially marked patrol car. Id at 6.

These facts are sufficient to allow plaintiffs to continue discovery in this case, to support the plaintiff's allegation that defendant City of Del Rio is liable for breaching their duty, including, but not limited to, providing Defendant Wesley Wilson with adequate supervision and training regarding the containment of prisoners.

IV. The Sheriff's Liability

Additionally, the court has created a test specifically for a sheriff s liability when the action is by the subordinate and not the sheriff personally. 245 F.3d 447 at 459. A sheriff is not liable on a theory of vicarious liability under

section 1983, but if 1) the sheriff failed to train or supervise the officers involved; 2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and 3) the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights. Id at 459 citing *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998); *Doe v. Taylor Independent School District*, 15 F.3d 443, 452-54 (5th Cir. 1994) (*en banc*) (adopting *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct 1197, 1205, 103 L.Ed. 2d 412 (1989). In such a case, a single instance of misconduct is not a violation of constitutional rights, *Snyder v. Trepagnier*, 142 F.3d 791, 798-99 (5th Cir. 1998). The plaintiff generally needs to show a pattern of behavior. Id at 798.

In the case at hand, plaintiffs have alleged that there was a pattern of behavior and violations, but have not alleged specific facts. At this stage, however, they are not required to do so.

V. The City's Liability

Defendants allege that plaintiffs failed to state a claim against the City of Del Rio under Section 1983.

Plaintiffs contend that the City violated plaintiff's Fourth Amendment right against unreasonable search and seizure. The Supreme Court has expressly ruled on this issue, stating that a police pursuit does not amount to a seizure under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1550-1551, 113 L.Ed.2d 690 (1991). Additionally, even failed attempts at seizure is insufficient. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708 (1998). Plaintiffs have failed to differentiate their own allegations from those in

the aforementioned cases. The facts, as alleged, are insufficient to show a seizure. On the part of the City of Plaintiff Rios.

Conclusion

After carefully considering Defendant's Motion to Dismiss, plaintiff's response, and the applicable law, it is **ORDERED** that Defendant's Motion to Dismiss with regard to Plaintiffs' claim, under Section 1983 for a Fourth Amendment violation is **DENIED**.

SIGNED on this the 14th day of July, 2004.

/s/ Dennis G. Green
DENNIS G. GREEN
UNITED STATES
MAGISTRATE JUDGE

TITLE 7. VEHICLES AND TRAFFIC

§ 545.404. UNATTENDED MOTOR VEHICLE.

SUBCHAPTER I. MISCELLANEOUS RULES

An operator may not leave the vehicle unattended without:

(1) stopping the engine;

(2) locking the ignition;

(3) removing the key from the ignition;

(4) setting the parking brake effectively; and

(5) if standing on a grade, turning the front wheels to the curb or side of the highway.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

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VOIR DIRE

A PUBLICATION OF THE AMERICAN BOARD OF TRIAL ADVOCATES

[LOGO] *cover story*

By Sam Sparks and George Butts[1]

Disappearing Juries and Jury Verdicts

Some History About Jury Trials

By the time John, " . . . by the Grace of God, King of England, Lord of Ireland, Duke of Normandy and Aquitane and Count of Anjou," signed the Magna Carta in 1215 in order to appease the insubordinate Scot, French, and English barons arrayed against him, the right of trial by jury, or judgment by one's peers, was already centuries old. It developed in Europe during feudal times and was brought to England with the Norman Conquest in 1066.[2] The Magna Carta provided that " . . . no free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him or send upon him, except by the lawful judgment of his peers or by the law of the land."[3]

Great Britain's Provocations

More than 500 years later when the British set about to deprive the rebellious colonials of their right to trial by a jury of their peers, they met strong resistance. By 1764 every American colony provided for a right to jury trial.[4] At that time the jury's prerogative extended not only to deciding controlling facts, but also to determining what law should be applied.[5] This power residing in juries resulted in the practical inability of British officials to

enforce, among other things, certain navigation acts designed to lay heavy tariffs on some commodities and to impose severe fines on violators. One Massachusetts governor complained that "a trial by jury here is only trying one illicit traitor by his fellows, or at least by his well wishers."[6] The Crown reacted to this inability to obtain either collections or convictions by, among other things, the creation of vice-admiralty courts in the colonies; that is, courts without juries.[7]

Passage of the Sugar Act of 1764 further inflamed the colonists by assigning the trials of those accused of a violation of the act to a vice-admiralty court in Halifax, Nova Scotia, irrespective of where the offense occurred. This compounded the denial of a right to a jury trial by removing the trial of the accused from his vicinage, or locale.[8]

The Sugar Act was followed closely by the Stamp Act of 1765, which required that revenue stamps be affixed to many kinds of legal papers. Violations of the act could be tried in the vice-admiralty courts, thereby greatly extending the power of those courts to cases involving violations of the revenue laws having nothing to do with maritime commerce.[9]

The Colonists' Responses

These actions, and others denying colonials the right to trial by jury in their vicinage, resulted in a series of escalating responses. The Stamp Act Congress of 1765 declared "trial by jury is the inherent and valuable right of every British subject in these colonies."[10] Further, "the said act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits have a

manifest tendency to subvert the rights and liberties of the colonists."[11]

The dispute between the king's government and the colonials escalated further with the passage of the Administration of Justice Act in 1774. That act authorized the trial of cases brought by the government for the collection of revenues to be held in Great Britain, an infringement of rights so egregious that it prompted British political writer and statesman Edmund Burke to protest: "[B]rought hither in the dungeon of a ship's hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence"[12]

The First Continental Congress responded directly to these constrictions on the right of jury trial in its Declaration of Rights in 1774, stating, in part:

> *Resolves, N.C.D.2. That our ancestors, who first settled these colonies, were at the time of their immigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England. . . .*
>
> *Resolves, N.C.D.5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law.*

The Continental Congress went on to decry these and other actions of the Crown as "grievous acts and measures" to which "Americans cannot submit."[13]

These laws drew negative comments even in the British House of Commons[14] and outrage in the American colonies.[15] The Provincial Congress of North Carolina resolved in 1774 "that trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest ages, confirmed and sanctified by the Magna Carta itself."[16]

South Carolina issued a declaration against Parliament's action "declaring that the people of Massachusetts Bay are liable for offenses or pretended offenses done in that colony to be sent to and tried for the same in England, or in any colony, where they cannot have the benefit of a jury of the vicinage."[17] Similar declarations of protest were mounted throughout the colonies.[18]

The Virginia legislature also passed a resolution, later known as the Virginia Resolves, protesting Parliament's action. The Virginia Resolves were adopted by the assemblies of every American colony.[19]

Clearly, the several attempts on the part of the British government to enforce their revenue-gathering laws through the restriction of the colonists' rights to trial by jury were contributing causes of the American Revolution. Among the "facts" complained of in the Declaration of Independence of July 4, 1776, were violations of both the colonials' rights to jury trial and that of the community to try British citizens for crimes committed in the colonies. It described the Administration of Justice Act as one of "pretended Legislation", "foreign to our constitutions" that protected the King's armed troops "by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states" and "for depriving us in

many cases of the benefits of jury trial", "for transporting us beyond seas to be tried for pretended offenses."[20]

The importance of the right of trial by jury was consistently emphasized by the declarations of the Stamp Act Congress of 1765, the Declaration of Rights of 1774, by the first Continental Congress, the Declaration of Independence of 1776, and the Northwest Ordinance of 1787. It was the only right secured in all state constitutions subsequent to the Declaration of Independence.[21]

The United States Constitution, as originally drafted by the Constitutional Convention and submitted to the states for approval, did not assure the right to trial by jury. This omission was pointed out continually by Patrick Henry and Thomas Jefferson. In his speech against the federal constitution at the Virginia Constitutional Convention, Henry decried the lack of guarantees of personal liberty, generally, and the absence of a right to trial by jury:

> *Is it necessary for your liberty that you should abandon those great rights by the adoption of this system? Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty?*
>
> *Will the abandonment of our most sacred rights tend to the security of your liberty? Liberty, the greatest of all earthly blessings. Give us that precious jewel, and you may take everything else!*
>
> *How does your trial by jury stand? In civil cases gone – not sufficiently secured in criminal – this best privilege is gone. But we are told that we need not fear; because those in power, being our representatives, will not abuse the power we put in their hands.*

> *I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers. I imagine, sir, you will find the balance on the side of tyranny . . .*

Thomas Jefferson was succinct in his statement of the importance of trial by jury:

> *I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution.*[22]

While the Federalists and anti-Federalist factions contended over the appropriate allocation of power to the federal government and the states, the general agreement of the importance of trial by jury was stated by Alexander Hamilton, himself a Federalist:

> *The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.*[23]

As all know, those contending for constitutional assurance of the right to trial by jury prevailed. The right to jury trial in criminal and civil cases is ultimately guaranteed in the Sixth and Seventh Amendments of the Constitution. To refresh recollections, the Seventh Amendment states:

> *In suits of common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried to a jury shall be otherwise re-examined in any*

Court of the United States, than according to the rules of the common law.

At great personal risk, with no assurance of the ultimate success of their rebellion, American colonists defied the far greater wealth and power of the British Empire to preserve, inter alia, our ancient and fundamental right to trial by jury. The leaders who formed our Constitution and, with it, the underlying structure of our government and judicial system, literally fought, wrote, and debated to assure that trial by jury survived in the new nation. They were unwilling to accept any other outcome on this issue. The question finally comes: are we? What are we doing with this long-held and hard-won right? As to both the extent to which the right is being utilized and the degree of deference given to jury verdicts by our appellate courts, the clear answer unfortunately seems to be, not much.

Where Have All the Juries Gone

Judge Patrick Higginbotham gathered statistics indicating that in the 30-year period from 1970 through 1999, the total number of civil cases filed in federal courts increased by 152% while the number of cases tried during that same period decreased by 20%. While it has always been true that a small percentage of cases are tried, the decline in the relative number of cases tried has been from 12% in 1970 to 3% in 1999.[24] By 2002 that number decreased to 1.8%.[25]

In 1962, each sitting federal district judge tried an average of 39 cases per year. That number dropped to 35.3 by 1987, then plummeted to 13.2 by 2002.[26] In 1962, there were 2,765 jury trials and 3,037 bench trials in federal

civil cases. In 2002, there were 3,006 jury trials and only 1,563 bench trials in federal civil cases. During that period total cases disposed of in our federal courts increased from 50,320 in 1962 to 258,876 in 2002, an amazing increase of 514% while total trials diminished by 1,233, or about 21%.[27]

Empirical data aside, the decline in trials and jury trials, in particular, is well known in the legal profession. Ask the next experienced trial lawyer you see and they will tell you that they don't try as many cases as they once did. A relatively newer lawyer is very likely to tell you that they have very little trial experience.

Commentators have sought to identify the reasons for the decline in trials. Common among the litany of causes are high costs, delay, crowded dockets, and perceptions that the system is random and unpredictable.[28] Judge Higginbotham identifies as a further reason the expectation that cases will settle, " . . . an expectation largely being fulfilled by the new class of lawyers, called litigators, few with substantial trial experience."[29] Alternative dispute resolution methods, such as arbitration and mediation, have in many instances replaced the resolution of issues through trial.[30]

Some commentators have suggested that the flight from the courthouse is a flight from the jury itself, with the attendant costs, perceived randomness of verdicts, inability to understand and apply the court's instructions, and general inability to comprehend complex evidence lying behind this reticence.[31] However, the data gathered by Judge Higginbotham indicates the relative decline in trials applies to bench trials, as well as to jury trials.[32]

There is marked disagreement about the importance of jury trials. While supporters revere trial by jury as "the most transcendent privilege which any subject can enjoy" and "the lamp that shows that freedom lives"[33], critics have reviled the jury as a "dozen dimwits gathered at random" and "the stupidity of one brain multiplied by twelve."[34]

Judge Higginbotham denies a jury collectively has less ability than does a single judge.[35] The Ninth Circuit has stated: "no one has yet demonstrated how one judge can be a superior fact finder to the knowledge and experience that citizen jurors bring to bear on a case. We do not accept the underlying premise . . . that a single judge is better than the jurors collectively functioning together."[36]

An early twentieth century commentator distinguished between the perceptions of a judge and jury as follows:

> *Strictly, judges do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.*
>
> *Therefore, the instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policemen and professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a ballet hitherto unvisited.*[37]

Whatever the final decision may be as between these contending perceptions, at least one true thing can be said:

for every case resolved by means other than trial to a jury, there is a guaranteed and fundamental right left unexercised. It is an ancient right that has been fought for and clung to for hundreds of years. In the Virginia Constitutional Convention, Patrick Henry often shouted to the Federalists, "Why is the trial by jury taken away?"[38] A better question for our current state is "Why is the trial by jury given away?"

Where Have All The Jury Verdits [sic] Gone?

Confounding the problem of the diminishing role of jury trials in our civil justice system is a disturbing pattern; a seeming willingness on the part of judges of the Fifth Circuit Court of Appeals and the Texas Supreme Court to substitute their preferred resolution of disputed fact issues for those made by trial juries. In instances where this is done, it risks being contrary to the "re-examination" provision of the Seventh Amendment to the United States Constitution" and Section 15 of article one of the Texas Constitution which provides that the right of trial by jury shall remain inviolate.[40]

Professor Dorsaneo contends that in legal analysis of court opinions the issue of "who should win" often overshadows the more important question of "who should decide".41 [sic] In simple and obvious terms, the willingness of appellate courts to substitute their view of contested fact issues for those of the jury renders the right to trial by jury decidedly less meaningful.[42] Since at least the early '90s, decisions by the Fifth Circuit and the Texas Supreme Court have undermined the constitutional authority of the jury to determine the factual issues in trial. A few examples are illustrative.

Fifth Circuit Cases

Some examples can be found by looking only at the Fifth Circuit opinions issued in January 2005. The first case we call to your attention is Brown v. Parker Drilling Offshore Corp.[43] In this case, the plaintiff Brown applied for work with Parker Drilling Offshore Corporation. He checked "no" when asked whether he had "present or past back and neck trouble" and was hired. Approximately 18 months into his employment, he had a back injury and made a claim. Background information established that in 1998 he injured his back while lifting a sack of corn, was treated in the emergency room and issued a wheelchair and walker. In 2000, while working for another employer, he was fired for falsely reporting an on-the-job accident and failing to disclose the 1998 back injury. Brown testified the 1998 and 2000 injuries resulted from a "muscle pull" that he did not think he had suffered any "past back and neck trouble," and he didn't believe the problems he had in the past were the types of problems the employer was inquiring about. The case went to trial, and the jury failed to find for the employer on its factual defense that Brown had intentionally misrepresented or concealed medical facts which were material to the decision to hire and which had a casual connection to the injury complained of in the lawsuit.

The jury returned its verdict in favor of Brown, and the district court remitted the jury's award regarding medical expenses. The district judge, apparently aware of the potential for scrutiny of the facts on appeal, wrote a detailed opinion specifically setting out the evidence the jury could have relied on in denying the defendant's defenses. Having reviewed the evidence that the jury heard and the trial court's detailed marshalling of the

facts supporting the jury's decision, the circuit reversed and rendered for the employer, concluding "the jury's finding that Brown did not willfully conceal his back injuries was a clear error." The significance of the decision is emphasized by the circuit panel when it slates:

> *This Court reviews factual findings of a jury for clear error . . . under a clear error standard this Court will reverse 'only if on the entire evidence, we are left with a definite and firm conviction that a mistake has been made.'*[44]

The Fifth Circuit simply admits what it has been doing for some time. If at least two of three judges on a panel are left "with a definite and firm conviction that a mistake has been made" by the jury, then they assume the authority to disregard entirely the jury's factual findings and make their own findings – whether as to liability or damages.

The issue of the court's usurpation of the jury's privilege was plainly exposed by the dissenting judge, who wrote:

> *Following a three-day jury trial in this hotly contested maintenance and cure lawsuit, the jury deliberated for five hours over all the competing claims of the parties and then returned a verdict in favor of Brown in the amount of $150,000.*
>
> *Having remitted the verdict to $100,000, the trial court fully discussed the, facts and law pertaining to Parker's post-trial motions and then denied them.*
>
> *Despite this context, the panel majority sifts through the evidence, essentially declares Brown*

to be unworthy of belief by the jury, and then substitutes its appellate judgment for that of the jury. The majority discards the plaintiff's verdict and summarily renders a substitute verdict for Parker, the employer.

Because I decline to participate in the majority's usurpation of the jury, function, I respectfully dissent.[45]

On rehearing, the panel's patently unsustainable first opinion in this case was withdrawn.[46] Brown's recovery under the Jones Act for the employer's negligence was reinstated, the circuit panel indicating that its prior denial of this recovery was based on an error of law. The panel again denied Brown's recovery for cure and maintenance on the basis that, as a matter of law, he intentionally misrepresented he had no prior "back trouble," despite the existence of a great deal of evidence during the trial explaining why Brown answered the question the way he did. The same judge who dissented from the original opinion did so again on the basis that the majority of the panel continued to substitute the conclusions that they would have reached in resolving conflicting evidence in place of those reached by the jury.[47]

Subsequently, a petition for rehearing en banc was filed. It was darned by the majority of the court, but still drew a spirited dissent from Judge Stewart, the same judge who dissented from the circuit panel's prior opinions. Five other judges joined him in stating:

The panel majority, under the guise of correcting errors of law, usurped the jury's Seventh Amendment function, replacing the jury's verdict with a verdict of its own. Brown's petition for hearing en banc was not an invitation for the full court to

> *retry this case for a third time, but an opportunity to correct the lamentable message that the panel majority's decision sent to the bench and bar throughout the Fifth Circuit – no jury verdict is invulnerable before this court. The panel majority's decision commandeered the jury's role as fact finder and it is principally for this reason that I vehemently dissent from the full courts refusal to hear this case en banc.*[48]

Judge Stewart has allies on the court.[49] After wholly agreeing with Judge Stewart's dissenting opinion, Judge Wiener authored a concurring dissenting opinion further critiquing the circuit panel's impermissible "appellate review of the facts."[50] He states, in part:

> *. . . I write only to supplement Judge Stewart's latest dissent with a more detailed explication of where, with respect, I perceive my colleagues of the panel majority (and those who failed to vote to rehear it en banc) to have violated our venerable precedent, thereby – unintentionally, I am sure – doing damage to the federal courts' civil jury system and thus to the Seventh Amendment to the United States Constitution. . . . This is precisely the kind of civil jury case in which the verdict (and the refusal of the district court to supplant it) should not have been overturned on appeal.*
>
> *Otherwise, as Judge Stewart pointed out in his panel dissents and again in his dissent from denial of rehearing en banc, we do irreparable harm to the civil jury system in this circuit when we allow the panel majority's jury reversal to stand . . .*

The present status then in the Fifth Circuit is Circuit Judges Stewart, Higginbotham, Wiener, Benavides, Dennis and King honoring the Constitutional mandate while

Circuit Justices Jones, Jolly, Davis, Smith, Barksdale, Garza, DeMoss, Clement, Prado and Owen either not understanding the Constitutional authority of the jury or simply ignoring it.

Still looking only at the month of January 2005, an additional example of circuit judges disregarding a jury verdict is found in Carboni v. General Motors Corp.[51] There, Carboni was driving his General Motors vehicle when an unidentified vehicle swerved into his lane, causing him to take evasive action and his car slammed into a guard rail. The driver's side air bag did not deploy upon impact and he struck his head on the steering wheel sustaining brain damage. The jury returned its verdict for Carboni. A final judgment based on the jury's verdict was entered.

The circuit panel held there was more than adequate evidence in the record that the failure of the air bag to perform violated the express warranty given by General Motors. The evidence was undisputed the air bag should have deployed, but didn't; that Carboni's head hit the steering wheel, resulting in brain injury; and that Carboni's head would not have hit the steering wheel had the air bag deployed properly. The trial judge excluded testimony from one of the plaintiff's experts regarding causation and enhancement injuries because of the Daubert standard. The circuit judges noted that no expert testified what injuries Carboni would have suffered in the event the air bag operated properly and what injuries he suffered as a result of the air bag not deploying. Consequently the court vacated the judgment, rendering a take-nothing judgment against Carboni, because there was no evidence that his injuries were enhanced because of the failure of the air bag.

While the court is correct in stating that there was no expert testimony specifically stating that Carboni suffered more severe injuries than he would have received had the air bag deployed, there is evidence in the record that was sufficient to uphold the jury's finding. It was undisputed Carboni suffered head injuries when he hit the steering wheel, and there was expert testimony to that effect. There was also expert testimony that Carboni's head probably would not have hit the steering wheel had the defective air bag deployed properly. Finally, there was evidence Carboni suffered a brain injury as a result of his head hitting the steering wheel. While there was no specific testimony that Carboni's head injury was worse from having hit the steering wheel than if he had not hit the steering wheel, that is an obvious and reasonable inference the jury was entitled to draw. Moreover, given the testimony in this case, it is an entirely logical conclusion Carboni's head would have not hit the steering wheel had the air bag deployed and, therefore, he would have not suffered the brain injuries which the expert testimony established resulted from hitting the steering wheel. In this instance, the circuit panel has denied the plaintiff a recovery based upon the jury's logical inference that the specific injuries Carboni suffered would not have occurred had the air bag deployed and instead, have substituted their own far less logical inference that there was no proof Carboni's brain injury that resulted from striking the steering wheel was enhanced by the failure of the air bag to deploy.

Fact findings by trial judges suffer no better fate in the Fifth Circuit. In Mumblow v. Monroe Broadcasting, Inc.,[52] the Fifth Circuit panel reversed the factual findings

of the trial judge in a non-jury case, holding, "[b]efore we will disturb the trial court's factual findings, we must be 'left with a definite and firm conviction that a mistake has been made.' Because we have thoroughly reviewed the record and are left with such a conviction, we reverse."

Therefore, presently in the Fifth Circuit, any judgment entered on factual issues found by a jury or a judge can be reversed by two circuit judges who believe the fact finder made a mistake.

The "Maximum Recovery Rule"

This discussion would not be complete if we failed to remind you of the Fifth Circuit doctrine of the "maximum recovery rule" created over the last several years. This theory limiting damages found in a jury's verdict started in Jones Act cases, but today is applied across the board in personal injury cases. Simply stated, the rule is that if the circuit judges believe the damages determined by the jury are too large, they research the thousands of published opinions for similar facts with a lesser award of damages and then hold the "maximum recovery" cannot be greater than some percentage of the lesser award. It makes no difference that the verdicts were based on different evidence, determined by different juries in different places at different times with different witnesses, tried by different lawyers, and presided over by different judges making different rulings on different motions and objections in different procedural contexts.

However, exactly what the "maximum recovery rule" is has never been decided by the Fifth Circuit en banc. Various panels have concluded that the benchmark

against which a verdict is to be measured for excessiveness is either 0%,[53] 133%,[54] or 150%,[55] take your pick.[56]

While the cases recite that similar cases with similar injuries are used to assure comparative uniformity and fairness from one case to another, the reality is sometimes different. In Dixon v. International Harvester Co.,[57] the jury award of $2.8 million to a man who was punctured by a sapling and pinned to the interior of a tractor cab resulting in severe pain and mental anguish and the loss of both testicles was reduced to $890,000. The case used for determining the "maximum recovery" involved victims of a grain mill explosion who suffered severe burn injuries over 38% and 60% of their bodies, respectively.

That the "maximum recovery rule" is imprecisely stated and applied is clear, but the underlying casualties of its application are fundamentally more serious. The first of these is the principle, often espoused by the Fifth Circuit, that each case is determined by its own facts.[58] Second to fall is the deference traditionally afforded the fact finder.[59] Also lost is the limitation imposed by the "re-examination clause" of the Seventh Amendment itself. It is obvious that the Fifth Circuit has decided that it is better at deciding damages than are the juries who heard the evidence. Unfortunately, their actions are sometimes contrary to the letter and spirit of the Seventh Amendment.

Texas Supreme Court Cases

The Supreme Court of Texas may be guilty at times of this same too-ready willingness to disregard jury verdicts. On January 10, 2005, in Volkswagen of America, Inc. v. Ramirez,[60] the Court reversed and rendered a judgment

based on a jury verdict. In this case, two vehicles were proceeding in the same direction on U.S. 83 when they bumped each other, resulting in a Volkswagen Passat's crossing the median and colliding head-on with a Ford Mustang. There were deaths and substantial injuries in this accident. There was no dispute that the wheel separated from the Passat, but there was a dispute over when the wheel assembly detached and whether the detachment caused the accident. Each side had expert witnesses. The plaintiff's expert testified that the left rear wheel detached from the axle as the Passat entered the median and fishtailed across the grass and concrete and further testified that the "laws of physics" explain how the wheel was able to remain pocketed in the rear wheel well throughout this turbulent accident. Volkswagen's expert testified the wheel separated as a result of the impact between the two vehicles going in opposite directions. The Supreme Court held the two experts for the plaintiff failed to present sufficient evidence that a defect in the Volkswagen caused the accident. The opinion is long, but Chief Justice Jefferson's dissenting opinion succinctly focuses on the obvious problem with the majority's reasoning:

> *The Court concludes that Cox's testimony amounts to 'no more than a mere scintilla' of evidence on causation. . . . To the contrary, Cox testified that the Passat experienced a 'catastrophic failure of the wheel bearing assembly' while it was traveling in the eastbound lane of U.S. Highway 83 before, the Passat entered the median. He both tested and rejected Volkswagen's alternative theory – that damage to the wheel bearing assembly occurred after the Passat's collision with the Mustang. Reasonable jurors could have accepted Volkswagen's theory and rejected Cox's . . . , or accepted Cox's and rejected Volkswagen's . . . , but*

> *unlike the jury, this Court lacks constitutional authority to weigh conflicting evidence. Accordingly, I respectfully dissent from the Court's rendition of judgment for Volkswagen.*[61]

In Southwestern Bell Telephone Co. v. Garza,[62] the Supreme Court reversed a jury verdict awarding punitive damages by announcing a new rule for evaluating the quality of evidence in instances where the case involves an enhanced burden of proof. "Clear and convincing" evidence was necessary to sustain the jury's finding of malice that supported its award of punitive damages. A Supreme Court majority explained its ruling, in part, as follows:

> *[W]hen proof of an allegation must be clear and convincing, even evidence that does more than raise surmise and suspicion will not suffice unless it is capable of producing a firm belief or conviction that the allegation is true. Evidence of lesser quality is, in legal effect, no evidence, . . . in reviewing a finding that must be proved by clear and convincing evidence, it makes no sense for an appellate court to determine whether the supporting evidence amounts to more than a scintilla. Even if it does, the finding is invalid unless the evidence is also clear and convincing. In such a case, the review required by the 'scintilla' rule is wholly irrelevant and, thus, no review at all. Thus, as a matter of logic, a finding that must meet an elevated standard of proof must also meet an elevated standard of review.*[63]

Justice O'Neill concurred in the result, but argued in her concurring opinion that the majority overreached "the constitutional limitation that the factual conclusivity clause imposes upon our jurisdiction, yet proceeds to weigh the evidence unfettered by any such constraint.

Because the court usurps the factual sufficiency review power that our Constitution reserves to the court of appeals, I cannot join in its opinion."[64]

Another case in which the Texas Supreme Court set aside a large jury verdict in Diamond Shamrock Refining Co. v. Hall,[65] where the plaintiff's decedent died of burns he suffered in a refinery explosion. The widow sued Diamond Shamrock for gross negligence to recover exemplary damages. The explosion was the result of complex facts, but basically a hydrocracker unit was being restarted following a routine maintenance shutdown and it began to overheat causing excessive vaporization of liquid hydrocarbons. The vapor turned to liquid when it cooled and the suction drum began to fill with the liquid, a potentially explosive situation. Recognizing the danger of explosion from sending liquids into a compressor, the operator requested instructions to change the flow of liquid, but his request was refused. Notwithstanding, the operator disobeyed his instructions and diverted the flow to storage. The automatic shut-off switch on the suction drum failed to operate, and finally, the compressor was shut down manually. At that point there was a crew change and, unfortunately, the plaintiff's decedent came on shift. Ultimately there was a fire resulting in him being fatally burned. The jury awarded $32.5 million in exemplary damages. The trial judge ordered a remititur, but overruled all of the defendant's motions on liability, holding there was sufficient evidence to justify the jury's verdict. The Court of Appeals affirmed, specifically describing the evidence and holding it sufficient for the finding of gross negligence supporting the jury's verdict. The majority of the Supreme Court writes for pages, reviewing voluminous evidence, but basically holds that

while there was clear evidence of negligence, there was no clear and convincing evidence "Diamond Shamrock was unconcerned." Of course, the difference between evidence of negligence and gross negligence is in the eye of the beholders, whether the judges in Austin or the jury that heard the evidence.[66] This appears to be a case where the "who should win" part of the dichotomy suggested by Professor Dorsaneo trumped the "who should decide" consideration. We submit that proper application of the Seventh Amendment's "reexamination" clause might change the result.

It is obvious the Texas Supreme Court regularly reverses judgments based upon jury findings. In some instances, that is the court's proper function. Unlike the Fifth Circuit where some judges reverse jury findings without reticence if they determine "clear error" has occurred, the Texas Supreme Court appears to carefully analyze the evidence to determine whether it is legally adequate to support the jury's verdict. But, having done so, in some instances it appears the court ultimately reverses the jury's verdict based upon the court's preferred interpretation of the facts or by recharacterizing the issues in the case in order to avoid the effect of the jury's verdict. Other recent cases that are subject to this interpretation are:

1. Haggar Clothing Co. v. Hernandez.[67] Hernandez sued her former employer, Haggar Clothing Co., alleging she was fired in retaliation for filing a worker's compensation claim after an injury on the job. The jury found in her favor on her retaliation claim, found that Haggar acted with actual malice, and awarded compensatory and exemplary damages. The Court of Appeals affirmed, holding the evidence was legally and factually sufficient to

support the jury's findings, but the Supreme Court in a per curiam opinion reversed and rendered. After reciting evidence in the record that seems to support the jury's findings, the court cited its own prior authority in holding that Haggar, the employer, terminated Hernandez pursuant to the uniform enforcement of a reasonable absence-control provision, and, therefore, was not subject to the charge of retaliatory discharge, as a matter of law, the specific facts of the case and the jury's verdict based on them notwithstanding.

2. Southwest Key Program, Inc., et. al. v. Gil-Perez.[68] An employee of Southwest Key took Gil-Perez to a sports stadium to participate in athletic activities. An impromptu football game occurred in which the Southwest Key employee allowed Gil-Perez to participate so long as tackling was "only below the waist." None of the players wore any football equipment. Gil-Perez was tackled and suffered a dislocated knee. He sued Southwest Key, alleging negligence in allowing him to play tackle football without providing protective gear or equipment. Despite jury findings of negligence and proximate cause, the Supreme Court reversed on the basis that there was no evidence of "cause in fact" that the lack of protective equipment resulted in the knee injury.

3. U.S. Silica Co. v. Tompkins.[69] Tompkins sued U.S. Silica claiming that he contracted silicosis from using its flint products in abrasive blasting work. The jury found for plaintiff and the Court of Appeals affirmed. The Supreme Court reversed and remanded for a determination of the issue of whether if warnings had been given, they could have effectively reached the employees who used the silica products.

4. Military Highway Water Supply Corp. v. Morin.[70] This case arises out of a unique set of facts in which a motorist driving lawfully on a highway struck a horse causing him to lose control of his vehicle and to swerve all over the road and areas adjacent to the road until he struck an excavation left uncovered by a contractor. After having skidded and swerved around for more than 500 feet from the point of impact with the horse, hitting the excavation tripped the car and killed the plaintiffs' decedent. The excavation work was done by a contractor for Military Highway Water Supply Corporation. The evidence was that since the Texas Department of Transportation had an easement over the area, Military Highway was required to fill in the excavation after it completed the work of installing a water meter. Evidence indicated that the uncovered hole was 21 to 25 feet from the edge of the road. The work occurred on June 3, 1996. In July 1996, a neighboring landowner notified Military Highway that the excavation had not been filled, but no action was taken to fill it. The accident occurred on August 1, 1996. The jury found Military Highway and the driver were respectively 52% and 48% responsible and awarded damages to the plaintiffs.

The Texas Supreme Court reversed and rendered, holding Military Highway owed no duty to the plaintiffs under RESTATEMENT (2ND) OF TORTS § 368 which provides in relevant part:

> *A possessor of land who creates or permits to remain thereon an excavation . . . so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon*

> *the highway, is subject to liability for physical harm thereby caused to persons who . . . (a) are traveling on the highway, or (b) foreseeably deviate from it in the ordinary course of travel.*

The court concluded, as a matter of law, that leaving the highway as a consequence of striking a horse was not in the "ordinary course of travel" and, therefore, Military Highway owed no duty to plaintiffs' decedent. Obviously, whether a duty existed was ultimately a question of law for the court. However, it is difficult to understand how it is a question of law as to whether or not striking a horse wandering at night on a farm to market road in a rural area in a county without local stock laws while operating a vehicle at legal speed is in the "normal course of travel." The court clearly assumed the answer to the fact issue underlying its "no duty" decision, a fact issue that apparently was never submitted to the jury.

5. Excel Corp. v. Apodaca.[71] The Supreme Court reversed a judgment based upon a jury verdict for injuries sustained in the workplace because there was no specific proof that any negligence of the employer was a "but for" cause-in-fact of the plaintiff's injuries. In this case, the court recites an extensive amount of evidence about the repetitive nature of the work that the plaintiff performed and injuries he sustained as a consequence of his work. In addition, there was testimony about recommended changes to work procedures, recommended, but not instituted changes in ergonomics, OSHA recommendations about recommended changes to the work site, the use of surveys to identify work-related symptoms, and medical testimony linking the plaintiff's injuries to his job. However, the court concluded, unlike the jury, there was no evidence

any negligence on the part of the employer was a "but for" cause of the plaintiff's injuries.

While the Texas Supreme Court does on the surface appear to engage in traditional "no evidence" analyses of the factual support for jury verdicts, in actual practice it has a hard time letting them stand. In the several cases cited in this paper, the court has:

1) found that evidence of a specific defect was inadequate, thereby disallowing the jury's inference that a defect existed (Ramirez);

2) created a new standard for the review of evidence necessary to support issues involving an enhanced burden of proof, thereby reversing a judgment based on a jury's verdict because the proof was inadequate when compared to the newly announced standard (Garza);

3) weighed evidence about a defendant's conduct and concluded that the jury was not entitled to draw an inference that a defendant was indifferent to the risk of explosion (Hall);

4) found an employer was merely enforcing a reasonable absence-control provision, rather than discriminating against the plaintiff, when the jury was never asked that question (Hernandez);

5) concluded that the jury could not infer "cause in fact" of a knee injury that resulted while playing tackle football without protective equipment (Gil-Perez);

6) reversed and remanded a judgment based on a jury verdict in order to obtain a finding on an additional fact that was not submitted to the jury (Tompkins);

7) determined, as a matter of law, that leaving a highway after striking an object was not a part of the "ordinary course of travel", when that question was never submitted to the jury, thereby deciding that the defendant had no duty to avoid the negligence that the jury found was a cause of a death (Morin); and

8) disallowed the jury's inference that defendant's negligence was a "cause in fact" of plaintiff's injury where there was extensive evidence about the nature of the plaintiff's work and no apparent dispute that the plaintiff's injuries resulted from it (Apodaca).

All of these decisions resulted in reversal of jury verdicts. All save one resulted in rendition of judgments contrary to the lower courts' holdings based on jury verdicts. It can be credibly argued that some of these cases were correctly decided. It might be argued that the Texas Supreme Court does not systematically overturn jury verdicts in favor of plaintiffs. At a minimum, it seems clear that the Texas Supreme Court often fails to give appropriate deference to jury verdicts in cases where the court disagrees with the result reached below.

Compelling Arbitration

One of the forms of alternative dispute resolution that frequently supplants jury trials is compulsory arbitration. The Texas Supreme Court has recently decided two cases that evidence the court's strong preference for arbitration over litigation.

In re Weekley Homes, L.P.,[72] was a case of first impression, in which the Texas Supreme Court conditionally granted an application for writ of mandamus to require a

trial judge to compel arbitration. The unusual aspect of the case is that the person resisting arbitration was not a party to the contract containing the arbitration clause sought to be enforced. Rather, she was the adult daughter of the owner of the house that was the subject of litigation. She did not assert any claims under the contract between her father and the homebuilder, nor did she sue as either trustee or beneficiary. However, the court justified its conclusion to compel arbitration by pointing out that the plaintiff had taken advantage of the benefits of the contract, was in fact the equitable owner of the house, and, therefore, under the "direct-benefits estoppel" theory, should be bound by the contract's arbitration clause, as well.[73]

In re Dillard Department Stores, Inc.[74] is another example of the Texas Supreme Court's strong policy favoring arbitration. In Dillard, Garcia was discharged from her job as a sales associate at a Dillard's store. She filed a retaliatory discharge suit. Dillard's filed an original mandamus proceeding in the Texas Supreme Court seeking to enforce an arbitration policy adopted by the company that it claims covers most employment disputes, including that of Garcia. She claimed she had never agreed to an arbitration policy and, in fact, had specifically refused to sign a form that required arbitration. Dillard's was unable to produce anything in writing whereby Garcia acknowledged receipt of the arbitration policy. Despite that fact, the court concluded Garcia attended a meeting at which she received an acknowledgement form advising employees of Dillard's policy requiring arbitration of employment disputes. Ultimately, the Supreme Court concluded that both the trial court and the court of appeals abused their discretion by not granting Dillard's motion to

compel arbitration. The effect of the Supreme Court's holding is that Garcia lost her Seventh Amendment right to a jury trial when she elected to continue her employment with Dillard's after having received a form stating Dillard's requirement that employment disputes be arbitrated.

Should The Civil Jury Be Abolished Or Reformed

So, what is our point? Obviously, there is ample room for fair debate about whether our use of juries in our civil justice system should be changed, reformed, or improved. It may be true that juries are unable to make reasoned decisions in complex cases. It may be the case that jury trials are too expensive for many purposes. It could be decided that the use of juries in the civil justice system is fairly subject to all the myriad arguments and complaints that have been catalogued against it.[75] But, all of those ample criticisms must be balanced against the benefits that juries add to the administration of justice. They import community values into the process of adjudication.[76] De Toqueville observed in his commentaries, that the American jury is a "political institution . . . one of the forms of the sovereignty of the people."[77] The jury's role in this regard has been generally recognized as "an organ of the people's original sovereignty."[78]

In the plainest terms, without juries all decisions either imposing or relieving civil or criminal liability, whether from the executive, legislative, or judicial branch, come from people who are, in one capacity or another, employees of governmental entities. Juries not only bring community values to the process of adjudication, they

provide a vital and important buffer between the all-powerful government and the individual before the court, whether in civil or criminal cases. It does not require a long memory or a sophisticated understanding of history to conclude that the deposition of all forms of decision making affecting civil and criminal rights in the government, and only in the government, is undesirable. Our founders clearly understood this and fought against it.

If there is need for improvement, change or reform of our civil jury system, then proponents of that change should make their case in appropriate and public settings with due provision for notice, discussion, and debate. It should not be done by individual judges or courts deciding individual cases, most of which cannot receive meaningful review. Any efforts at reform can only begin with the Sixth and Seventh Amendments to the United States Constitution and the constitutions of each of the United States that guarantee all citizens the right of trial by jury. Perhaps, after thorough consideration and open discussion and debate, our citizens will choose to amend our constitutions and give up their right of trial by a jury of their peers. However, until that happens it is unconstitutional for courts to disregard jury decisions that are supported by sufficient and competent evidence. We, as lawyers, are sworn to uphold the Constitution of our country and our states. As lawyers, we should identify those instances where proper jury verdicts are discarded. We must tell the guilty judges that it must stop because it upsets the balance between the rights of the people and the power of the judiciary.

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[53] Lebron v. United States, 279 F.3d 321, 326-27 (5th Cir. 2002).

[54] Douglas v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990).

[55] Giles v. General Electric Co., 245 F.3d 474, 488-89 (5th Cir. 2001).

[56] A fact never discussed is that the damages awarded in the cases used for comparison were not determined to be the maximum amount that the evidence would sustain, only the amount awarded by the jury in that case. It is illogical to use such an award, never tested against the "maximum" standard, as a basis for deciding the permissible maximum in a different case.

[57] 754 F.2d 573 (5th Cir. 1985).

[58] See Lawrence J. Madigan, Fifth Circuit Survey (June 2001 – May 2002), 34 TEX. TECH. L. REV. 429, 440-41 (2003) and authorities cited therein for a more thorough discussion of the "maximum recovery rule."

[59] Id.

[60] 159 S.W.3d 897 (Tex. 2004)

[61] Id. at 913 (emphasis added). Implicit in this dissent is that the Texas Supreme Court is prohibited by the state's constitution from determining the factual sufficiency of evidence to support any jury finding that authority being reserved to the Courts of Appeals by Article 5, §6 of the Texas Constitution.

[62] 164 S.W.3d 607 (Tex. 2004).

[63] Id. at 621-22 (emphasis added).

[64] Id.

[65] 2005 WL 1691623 (Tex. Jul. 8, 2005).

[66] The court's original opinion in this case published at 48 Tex. Sup. Ct. J. 354 (Tex. Jan. 21, 2005) was withdrawn and the court's opinion cited in footnote 51, supra, issued in its place. While the court reversed and rendered the judgment of the Court of Appeals based on a jury verdict in both opinions, the court's reissued opinion cited its prior decision in La. Pacific Corp. v. Android, 19 S.W.3d 245 (Tex. 1999) for analogous support. In Android, the plaintiff's decedent was ordered to operate a crane immediately adjacent to a lightpower line and was told the power had been cut off. He was electrocuted when he sat down. The evident at trial was that different employees thought others had cut off

the power, but no one ever checked. The Supreme Court held since no one knew that the power was on, the employees could not have been consciously indifferent. The court applied the same logic in Shamrock, i.e., since no employee testified he knew there was explosive gas present (because no one checked), there could be no evidence of conscious indifference. Of course, all employees in both cases knew that if the power was on or if the gas was present, either of which could have been easily checked, there would be a disaster probably leading to a death. Nonetheless, the Supreme Court held this evidence was simple negligence and the jury, the trial court, and the Court of Appeals were wrong in believing otherwise.

[67] 64 S.W.3d 386 (Tex. 2005).

[68] 81 S.W.2d 269 (Tex. 2002).

[69] 156 S.W.3d 578 (Tex. 2005).

[70] 156 S.W.3d 578 (Tex. 2005).

[71] 81 S.W.3d 817 (Tex. 2002).

[72] 180 S.W.3d 127 (Tex. 2005).

[73] Compare, Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852 (1984) and Primo Paint Corp. vs. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967), which appear to leave the issue of the enforceability of arbitration to the arbitrator, not to the court. See also, Buckeye Check Cashing Inc. vs. Cardegna, 126 S.Ct. 1204, 74 USLW 4119 (2006).

[74] In re Dillard Department Stores, Inc., No. 04-1132, 2006 WL 508629 (Tex. Mar. 3, 2006).

[75] See, e.g., Smith, supra at 490.

[76] Id. at 470.

[77] Id. at 480 et. seq.; see also Smith, supra at 470-74 and authorities cited therein.

[78] Harington in ALA. L. REV., supra at 471 et. seq. and authorities cited therein.